STATE OF WISCONSIN

IN SUPREME COURT

Case No. 04-2481-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

MARK D. JENSEN,

Defendant-Respondent-Cross-Appellant.

ON BYPASS OF THE COURT OF APPEALS TO REVIEW A PRETRIAL ORDER SUPPRESSING EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

REPLY BRIEF OF DEFENDANT-CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Cites

STATE OF WISCONSIN

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ARGUMENT

I. JULIE JENSEN'S STATEMENTS TO THE WOJTS AND MS. DEFAZIO ARE TESTIMONIAL.

A. A Statement is Testimonial Under *Manuel and Crawford* If an Objective Witness Reasonably Would Anticipate the Statement's Potential Use as Evidence, Regardless Whether the Statement was Solicited By, or Made To, the Government.

In its opening brief, the state argued that the "main reason" Mrs. Jensen's statements to Kosman are not testimonial is because the letter was written when no

crime was committed.[1] The state's reply and response appear to abandon this argument. Rather, the state's principal argument now is that a statement only is testimonial if it was created through some type of government involvement.[2]

In arguing that government involvement is required for a statement to be testimonial, the state emphasizes the historical roots of the Confrontation Clause as discussed in *Crawford* and the most notorious practices that prompted its adoption. The state then suggests that in light of this history, statements only should be considered testimonial where the witness's statements were obtained in government-dominated atmospheres such as at preliminary hearings, in grand jury testimony, police interrogations, and plea allocutions. Upon closer examination, the state really is arguing that the definition of "testimonial statement" should be governed exclusively by the first and second formulations of "testimonial" identified in *Crawford*. It is too late for this argument, which is meritless in any event.

In *State v. Manuel*, 2005 WI 75, ¶39, 281 Wis. 2d 554, 697 N.W.2d 811, this Court adopted all three *Crawford* formulations. Accordingly, "'statements that were made under circumstances which would lead an objective witness reasonably to

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[1] Each party has filed three briefs. Jensen will refer to them as Opening Brief (for the state on its appeal; for Jensen on cross-appeal), Response, and Reply.

[2] The state's opening brief devoted just a single sentence touching on this claim. ("Moreover, the fact Julie did not write the letter at the request or suggestion of the police made it unlikely that an objective witness would reasonably believe the letter would be available at trial"). State's Opening Brief at 11.

believe that the statement would be available for use at a later trial,'" are testimonial. *Manuel*, 2005 WI 75, ¶37 (*quoting Crawford*, 541 U.S. at 52). Under this formulation, there is no requirement that the statement have been solicited by or made to the government. If there were, the Court could have decided *Manuel* simply by finding that the witness's statement was not testimonial because it was not made to the government. Instead, *Manuel* examined the circumstances surrounding the witness's statement and found that they did not satisfy the third *Crawford* formulation because it was made during a private, confidential, and spontaneous conversation. *Id.* at ¶53. Further, the defendant did not even contend that the witness expected his girlfriend to repeat his statement to police. *Id.*

By adopting all three formulations of "testimonial" identified in *Crawford*, *Manuel* rejected the crabbed reading of "testimonial" urged now in reply by the state. *Manuel* further suggested that additional statements not falling within those three formulations also may be testimonial. The state has not asked the Court to reconsider *Manuel*. *See* State's Brief at 9 ("the question is whether [Julie's statements] qualif[y] as testimonial under any of the *Crawford* formulations"). Accordingly, the focus on this appeal and cross-appeal is whether Mrs. Jensen's statements to Officer Kosman, the Wojts, and Ms. DeFazio satisfy the third formulation of "testimonial" under *Crawford*, and adopted in *Manuel*.

Further, as Jensen explained in his response brief at 13-20, to redefine "testimonial statements" to require government involvement in creating the statement would violate the Confrontation Clause. There is no sensible reason for affording different treatment to a witness's written statement to police upon their request and one sent unsolicited if the witness in each instance anticipated the statement's potential use as evidence. To do so invites law enforcement officers and potential witnesses to engage in manipulation to avoid live testimony. There also is no indication that any such distinction existed at common law given the historical concerns regarding the admission of written evidence, including letters, without cross-examination. *See* Jensen's Opening Brief at 9-10, 13-14. Courts should not freely admit statements if a witness has the wherewithal and sophistication to send an unsolicited accusation to police, yet decline to admit them only if the police asked for a prepared statement. *E.g., United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) ("the danger to a defendant might well be greater if the statement introduced a trial, without a right of confrontation, is a statement volunteered to police rather than a statement elicited through formalized police interrogation"). Whether the statement is requested by police or not, the inquiry must focus on the witness's reasonable expectation regarding potential evidentiary use of the statement. If the circumstances reveal that the declarant believed her statements to nongovernmental actors would be passed on to law enforcement, those statements are testimonial.

Jensen's interpretation is consistent with the overriding purpose of the Confrontation Clause to ensure that testimony be given at trial. The purpose of *Crawford*'s lengthy historical discussion was to illustrate how modern courts had failed to abide to the original meaning of the Clause by devising exceptions to the right to confrontation that permitted uncrossed testimonial statements to be admitted if deemed reliable.

The state asserts that the great weight of authority requires that testimonial statements be made to nongovernmental actors. The cases cited by the state, however, do not support that claim. Plainly, a statement to a government official is much more likely to be deemed testimonial, as the case law reflects. Statements made to friends and acquaintances often are not testimonial because they constitute a "casual remark to an acquaintance," *see Crawford*, 541 U.S. at 51-52, and therefore are not made in reasonable anticipation of use by law enforcement. *Manuel* is a good example. There, this Court did not hold that a statement to a friend could not be testimonial, but rather found that the statements were not testimonial under the particular circumstances. Like *Manuel*, several cases cited by the state stand merely for the proposition that under the particular facts, the witness's statements to a nongovernmental actor were not testimonial.[3]

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[3] *See, e.g., State v. Scacchetti*, 690 N.W.2d 393, 396 (Mn. 2005) (child's statements to nurse not testimonial because no showing that child or reasonable child of that age would believe disclosures would be available for use at a later trial); *Compan v. People*, 121 P.3d 876, 880-81 (continued...)

State v. Hemphill, 2005 WI App 248, __ Wis. 2d __, __ N.W.2d __, also is unhelpful to the state because it is factually distinct from Jensen's case and conflicts with *Manuel*. In *Hemphill*, the police responded to two calls about trouble with subjects, one of whom reportedly had a gun. Upon the officers' arrival, they observed two men walking away. A woman pointed at the two men and stated to police that "Those are the ones. That's them." *Id.*, ¶2. The court held that this statement was not testimonial because it was spontaneous and "offered unsolicited by the victim or witness, and was not generated by the desire of the prosecution or police to seek evidence against a particular suspect." *Id.*, ¶11.

Hemphill erroneously focused on the perspective of law enforcement rather than the perspective of the declarant in deciding the statement was testimonial as required under the third *Crawford* formulation. *See, e.g., United States v. Johnson*, 430 F.3d 383, 394 (6th Cir. 2005). Moreover, in *Hemphill* there apparently was no evidence to support a finding that the witness anticipated her statement's potential use as evidence. By contrast, here Judge Schroeder recognized that Mrs. Jensen may have intended her statements to the Wojts and Ms. DeFazio to be used in a prosecution. *See* Jensen's Opening Brief at 10-11.

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[3](...continued)
(Colo. 2005) (victim's "informal" statements to friend not testimonial because under circumstances an objective witness would not reasonably believe the statement would be available for use at a later trial); *Demons v. State*, 595 S.E.2d 76, 80 (Ga. 2004) (finding that statements to a friend were not testimonial where they were made "without any reasonable expectation that they would be used at a later trial").

Other cases relied upon by the state, such as *People v. R.F.*, 825 N.E.2d 287 (Ill. App. Ct. 2005), *People v. Garrison*, 109 P.3d 1009, 1011 (Colo. 2005), and *People v. Butler*, 127 Cal. App. 4th 49, 58-59 (2005), did not adopt or apply the third *Crawford* formulation and therefore offer no guidance here. *Manuel* requires at the very least that the trial court evaluate whether under the circumstances an objective witness reasonably would believe the statement would be available for use at a later trial. As discussed in the next section, Mrs. Jensen's statements are testimonial under the analysis mandated by *Manuel*.

B. Mrs. Jensen Reasonably Believed Her Statements to the Wojts and Ms. DeFazio Would be Used Against Mark.

As Judge Schroeder found, "Mrs. Jensen's statements to the Wojts and Ms. DeFazio could be viewed as remarks which were intended for the ears of the police, when viewed in conjunction with the conversations she had with Officer Kosman." (R97:2; A-Ap. 102). The state does not explain why this finding is "clearly erroneous." Nor does the state dispute Jensen's position that the state bears the burden of proving that the statements are not testimonial. Based on Judge Schroeder's finding that Mrs. Jensen's motive was ambiguous, the statements must be considered testimonial because the state cannot meets its burden of showing the statements were not testimonial.

The evidence supports a finding that the statements are testimonial. Mrs. Jensen made her claims to others with great ceremony, she did not make the claims

for the purpose of getting help, and she did not request confidentiality when she made her disclosures. Her indifference to the confidentiality of her communications differentiates this case from others like *Manuel* where the witness's statements were made in confidence, spontaneously, and with the expectation they would not be revealed. Here, Mrs. Jensen not only anticipated that her statements would be revealed, she specifically directed them to be forwarded to police if something happened to her. The statements were not spontaneous, but calculated, as demonstrated by her decision, planned in advance of one of her conversations with Mr. Wojt, to provide him with an envelope and film for police. She even informed the police that her neighbors had information for them, thereby ensuring their connection with the Wojts as witnesses. The information she disclosed was of such a serious nature that any objective declarant would recognize that the recipients would have to pass it on to police to be used against Mark.

Jensen is not asserting that the statements should be judged from the perspective of an "omniscient observer," State's Response at 10, but from Mrs. Jensen's perspective as she believed them to be at the time. At that time, she believed that her neighbors and Ms. DeFazio would report her statements to police to be used against Mark if something happened to her, and she believed something was going to happen to her.

Mrs. Jensen's statements to her acquaintances were not off-hand, casual remarks, but serious accusations that she elaborated upon to these acquaintances. An objective witness reasonably would believe that these statements would be provided to police and used against Mark. Accordingly, the statements were testimonial.

II. THE FORFEITURE BY WRONGDOING DOCTRINE DOES NOT APPLY TO THESE CIRCUMSTANCES

The state argued in its opening brief that the forfeiture by wrongdoing doctrine's incorporation in the Confrontation Clause in 1791 requires its analogous application today given that *Crawford* equated the scope of the Confrontation Clause to its scope at the time of the founding. State's Brief at 14-15. The state emphasized that the right of confrontation "'admitted only those exceptions established at the time of the founding,'" and that under *Crawford*, "if a particular out-of-court statement would have been admissible in 1791, the Constitution does not necessarily bar its admission." State's Opening Brief at 14 (quoting *Crawford*, 541 U.S. at 54).

Jensen's response brief established that the forfeiture by wrongdoing doctrine as it existed in 1791 would not permit the admission of Mrs. Jensen's statements for two reasons. First, the rule only applied when the defendant rendered the witness unavailable for the purpose of preventing the witness from testifying. As Judge Schroeder found, there is no such evidence here. Second, the forfeiture by wrongdoing doctrine did not permit the introduction of prior testimonial statements

of an unavailable witness unless the defendant had had a prior opportunity to cross-examine the witness.

The state does not dispute that Mrs. Jensen's statements would not have been admitted under the Confrontation Clause and the rule of forfeiture by wrongdoing as they existed in 1791. The state now claims that when *Crawford* discussed exceptions to the Confrontation Clause, it was referring only to "various hearsay exceptions believed to be outside the clause's coverage." State's Reply at 9. The state is wrong. *Crawford* used "exception" to refer to any consideration, rule, or statute that permitted a limitation on the right to confrontation. For example, the Court noted that after *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584, which settled the rule requiring a prior opportunity for cross-examination, "some doubts remained over whether the Marian statutes prescribed an *exception* to it in felony cases." 541 U.S. at 46. *See also* 541 U.S. at 54 n.5 (again referring to Marian examinations as "a statutory *exception* to the common-law rule"). In discussing the *Roberts* test, *Crawford* noted that it was "very different from *exceptions* to the Confrontation Clause that make no claim to be a surrogate means of accessing reliability." *Crawford* then identified the rule of forfeiture by wrongdoing as an example of such an exception. *Id.* at 62. Thus, the forfeiture by wrongdoing doctrine must be interpreted consistent with its scope in 1791 and not reinterpreted to satisfy perceived policy demands today, in violation of the Sixth Amendment.

Moreover, regardless of how this exception is characterized – as a "waiver," an "exception,", a "forfeiture," a "departure,"[4] in the "interest of justice," or as a "matter of public policy" – the result is the same: testimonial evidence will be admitted against the defendant without any opportunity for cross-examination. The decision to admit this testimonial evidence on the grounds of forfeiture would be a policy exception that impermissibly dilutes the protections of the Confrontation Clause.

The state relies on *People v. Melchor*, 2005 WL 3041536 (Ill. App. Ct. Nov. 14, 2005), which holds that forfeiture by wrongdoing only applies when the defendant acted with the intent to procure the witness's unavailability at trial. In dicta, however, the court suggested that it would apply forfeiture more broadly in a murder case where the defendant is charged with murdering the declarant. This Court should not adopt a "murder charge exception" given the more serious consequence associated with a wrongful conviction in murder cases.

Moreover, the Supreme Court has rejected the notion that constitutional rights may be diluted in murder cases because of their seriousness. *See Mincey v. Arizona*, 437 U.S. 385, 390-91, 394-95 (1978). In *Mincey*, the Court rejected the state's claim that there should be a "murder scene exception" to the Fourth Amendment. The Court noted that there would be no rational limitation to such a rule as the justification for

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[4]The term the state initially used. *See* State's Opening Brief at 14.

the rule would permit its application in other serious cases as well. The Court rejected the state's claim that Fourth Amendment rights could be forfeited by the defendant's misconduct:

> the State urges that by shooting Officer Hendricks, Mincey forfeited any reasonable expectation of privacy in his apartment. . . . [I]t suffices here to say that this reasoning would impermissibly convict the suspect even before the evidence against him was gathered.

Id. at 391.

The Supreme Court has heretofore limited forfeiture to instances where the defendant's misconduct was intended to undermine the integrity of the judicial process. *E.g., Illinois v. Allen*, 397 U.S. 337, 347 (1970). That limitation is more consistent with the common law forfeiture rule. The rule, as the state seeks to apply it, prejudges the defendant's guilt on a preponderance standard. If forfeiture may be applied to misconduct not designed to affect the truth-finding process based on policy consideration, there is no reason the doctrine cannot be extended further to limit other constitutional rights whenever a court believes the Constitution's protections may lead to undesirable results.

If this Court recognizes forfeiture, it should adopt standards that offer greater protection against wrongful convictions based on uncrossed statements. One way is to adopt the clear and convincing evidence standard. Another way would be to forbid consideration of the statements themselves in determining whether there is sufficient

evidence to support a finding of forfeiture. *See* J. Deahl, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 Mich. L. Rev. 599, 620-24 (2005).

Finally, the state asks that the court apply the forfeiture rule to hearsay, not just testimonial statements that would be excluded under *Crawford*. The Wisconsin Rules of Evidence do not include a forfeiture exception that admits otherwise inadmissible hearsay. Moreover, if the Court believes that *Crawford* warrants an expanded role for forfeiture, that does not justify expanding forfeiture to admit statements that would not have been admissible under the hearsay rules and the forfeiture doctrine prior to *Crawford*.

CONCLUSION

This Court should reverse Judge Schroeder's order admitting Mrs. Jensen's statements to the Wojts and Ms. DeFazio because they are testimonial and therefore their admission would violate *Crawford*. The Court should affirm Judge Schroeder's order holding that the forfeiture by wrongdoing doctrine does not apply to cases like this one where the defendant has not caused the declarant's absence for the purpose of preventing her from testifying.

Dated at Milwaukee, Wisconsin this 27th day of December, 2005.

Respectfully submitted,

MARK JENSEN, Defendant-Respondent-Cross-Appellant

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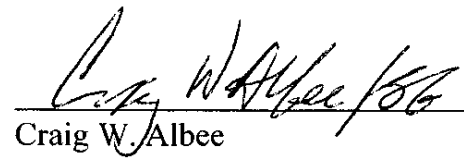

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this reply brief is 2,967 words.

Craig W Albee

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BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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BYPASS

TABLE OF CONTENTS

Page

Page

CASES CITED

Page

Page

Page

Page

Page

WISCONSIN STATUTES CITED

FEDERAL RULES

OTHER AUTHORITIES

STATE OF WISCONSIN

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ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in holding that Julie Jensen's letter to the Pleasant Prairie Police Department and her voicemail message for Officer Kosman were testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and therefore inadmissible at Mark Jensen's trial for Julie's murder?

The trial court found this evidence to be testimonial, and therefore inadmissible, under *Crawford*.

2. Assuming the oral statements and letter of the deceased are testimonial under *Crawford*, should this evidence nevertheless be admitted at Jensen's homicide trial under the doctrine of forfeiture by wrongdoing, if the State, outside the jury's presence, can convince the trial court by a preponderance of the evidence that Jensen killed his wife?

The trial court said no, ruling that the doctrine of forfeiture by wrongdoing is inapplicable here.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication of the court's opinion are warranted.

STATEMENT OF THE CASE

A criminal complaint charging Mark D. Jensen with first-degree intentional homicide in the December 3, 1998, poisoning death of his wife, Julie Jensen, was filed in Kenosha County Circuit Court on March 19, 2002 (1:1-6). Following a preliminary hearing on April 23 and May 8, 2002 (100; 101), the circuit court bound over Jensen for trial (101:109).

An information charging Jensen with first-degree intentional homicide was filed May 8, 2002 (13). At his arraignment on June 19, 2002 (14), Jensen entered a plea of not guilty (96:page 2 of 9).

After arraignment, a key issue became the admissibility of numerous statements the deceased had made during the weeks before her death. Following extensive briefing (30; 34; 46; 63; 68; 73; 77; 81; 82), the trial court conducted a hearing on the admissibility of Julie's oral statements to her neighbors, Tadeusz and

Malgorzata Wojt; her physician, Dr. Richard Borman; Officer Ron Kosman; and her son's teacher, Theresa DeFazio; and a letter Julie had written to the police (*see* 107; 108). At a hearing on October 8, 2003 (108), the trial court admitted some of the 109 oral statements Julie had made and excluded others. The court ruled that Julie's letter to the police was admissible in its entirety (*id.*:154).

Two months after the Supreme Court issued its landmark ruling in *Crawford v. Washington*, 541 U.S. 36, the State filed a trial brief discussing the implications of *Crawford* for Jensen's prosecution (89). Jensen responded with a "Motion to Reconsider Admissibility of Julie Jensen's Statements" in light of *Crawford* (91) and a reply to the State's trial brief (92).

A hearing on the motion to reconsider was held June 2, 2004 (109). On June 7, 2004, the trial court orally announced its decision (110). The court ruled that Julie's oral statements to Ms. DeFazio and the Wojts were nontestimonial and still admissible after *Crawford* (*id.*:2-4). However, the court concluded that Julie's letter to the police and her voicemail message and other oral statements to Officer Kosman were testimonial and therefore inadmissible under *Crawford* (*id.*:4-7, 21). The trial court rejected the prosecutor's argument that even if Julie's statements were testimonial, they might be admissible under the doctrine of forfeiture by wrongdoing (*id.*:18-21).

On August 4, 2004, the trial court issued a written order memorializing its oral rulings (97). The State filed a Notice of Appeal from this order on September 17, 2004 (98). On October 18, 2004, Jensen filed a Notice of Cross-Appeal from the same order (98-1).[1]

After the State and Jensen had filed opening briefs in the court of appeals, the State filed a petition to bypass,

[1]The State filed a motion to dismiss Jensen's cross-appeal, but the court of appeals denied the motion in an order dated January 27, 2005.

which Jensen did not oppose. On July 28, 2005, this court granted the State's petition.

STATEMENT OF FACTS

Julie Jensen, a forty-year-old mother of two, died in her bed in the family home in Pleasant Prairie, Wisconsin, on December 3, 1998 (1:1-2). The cause of death was ethylene glycol poisoning (1:1, 3).

According to the criminal complaint, during the three weeks prior to her death, Julie told a next-door neighbor and her son's third-grade teacher that she suspected her husband was trying to poison her (1:1-2). After Julie's death, the neighbor, Tadeusz Wojt, turned over to police a sealed envelope Julie had given Wojt with directions to deliver it to the police if anything happened to her (*id.*:2). The letter, addressed to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzenburg" and bearing Julie's signature, read as follows:

> I took this picture & am writing this on Saturday 11-21-98 at 7 A.M. This "list" was in my husband's business daily planner—not meant for me to see, I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work & the kids; he's an avid surfer of the internet . . .
>
> Anyway—I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don't. I would never take my life because of my kids—they are <u>everything</u> to me! I regularly take Tylenol & multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Immodium [sic]; have one perscription [sic] for migraine tablets, which Mark use[s] more than I.
>
> I pray I'm wrong & nothing happens . . . but I am suspicious of Mark's suspicious behaviors & fear for my early demise. However, I will not leave David &

> Douglas. My life's greatest love, accomplishment and wish: "My 3 D's" – Daddy (Mark), David &, Douglas.

(*Id.* 73:9; A-Ap. 136.)

After comparing the letter to known writing samples from Julie, a document examiner with the State Crime Lab concluded that the letter was written by Julie Jensen (1:2-3).

After Julie's death, police seized Jensen's computer from his residence (1:4). A computer evidence technician with the State Crime Lab was able to recover "very personal" e-mail communications between Jensen and Kelly Labonte (*id.*). Labonte later admitted to Detective Ratzburg that she and Jensen had had a "romantic" relationship since October/November 1998 and that she spent nights in the Jensen home the month after Julie died (73:7).

Internet access records recovered from Jensen's hard drive also revealed that between October 15 and December 2, 1998, Jensen had visited several websites related to poisoning, including one site entitled "Ethylene Glycol" (1:4). That site was accessed at 6:23 a.m. on December 2, 1998 (*id.*), the day before Julie died.

Dr. Jeffrey M. Jentzen of the Milwaukee County Medical Examiner's Office, Dr. Christopher Long, a forensic toxicologist, and Dr. Maureen Lavin, the Kenosha County Medical Examiner, all concluded that Julie's death was a homicide (1:3, 5).

At least since the preliminary hearing in 2002, the defense theory has been that Julie Jensen's death was a suicide (*see* 100:59). Accordingly, the defense hired a psychiatrist, Dr. Herzl Spiro, to conduct a psychiatric case study of Julie Jensen (*see* 92:9-35), and a forensic pathologist, Dr. Scott Denton, to provide an opinion on whether Julie's death was a suicide (*id.*:36-41).

In a report dated May 26, 2004, Dr. Spiro opined that "Ethylene glycol ingestion, in this case, is more likely the product of a suicidal intent than it is the product of accidental ingestion or homicide" (92:33). Similarly, in a letter to defense counsel dated May 7, 2004, Dr. Denton concluded that Julie Jensen's death "is best certified as suicide, or possibly undetermined. . . . There is more convincing evidence for a determination of suicide than homicide" (*id.*:41).

Additional facts will be presented in the Argument section.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT JULIE JENSEN'S LETTER TO POLICE AND HER VOICEMAIL MESSAGE FOR OFFICER KOSMAN ARE TESTIMONIAL UNDER *CRAWFORD*.

A. Standard of review.

Whether the admission of particular evidence violates the defendant's right to confrontation is a question of law subject to independent appellate review. *State v. Hale*, 2005 WI 7, ¶ 41, 277 Wis. 2d 593, 691 N.W.2d 637. For purposes of that review, the appellate court must adopt the circuit court's findings of fact, unless they are clearly erroneous. *State v. Jackson*, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998).

B. Neither Julie's letter to police nor her voicemail message is testimonial under the three *Crawford* formulations this court adopted in *Manuel*.

On March 8, 2004, the Supreme Court shocked the criminal justice system by declaring that the Confrontation Clause bars admission of an out-of-court testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement. *Crawford v. Washington*, 541 U.S. at 68-69. Until *Crawford*, confrontation challenges were governed by *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that the Confrontation Clause does not bar admission of an unavailable declarant's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" *Id.* at 66. Under *Roberts*, a statement was sufficiently reliable if it fell within a firmly rooted hearsay exception or if it bore particularized guarantees of trustworthiness. *Id.*

In light of *Crawford*, the circuit court reconsidered its earlier rulings admitting Julie Jensen's letter to Officer Kosman and Detective Ratzburg (*see* 108:154) and portions of Julie's conversation with Kosman on November 24, 1998 (*see* 107:95-151; 108:16-29). The circuit court ruled that the letter and all of Julie's statements to Kosman are testimonial under *Crawford* and therefore inadmissible in the State's case-in-chief (110:4-7, 21). On appeal, the State is challenging the trial court's ruling with respect to Julie's letter and her voicemail message to Kosman.[2]

[2]At a June 2004 hearing, the district attorney conceded that statements Julie made to Kosman during a conversation on November 24, 1998, were testimonial (109:20). With respect to these statements, the State is arguing only that they are admissible under the rule of forfeiture by wrongdoing. *See* argument II., *infra*.

The Supreme Court in *Crawford* refused to settle on a single definition of "testimonial," instead identifying "[v]arious formulations of this core class of 'testimonial' statements":

> "'*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'";
>
> "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"; and
>
> "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"

541 U.S. at 51-52.

Although identifying three possible formulations of testimonial statements, the Supreme Court did not adopt any one of them. Instead, saying it would "leave for another day[3] any effort to spell out a comprehensive definition" of testimonial, the Court issued a narrow holding:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.

Id. at 68.

Confronted with the question of whether a declarant's statements to his girlfriend were testimonial, this court in

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[3]That day may be coming soon. As of this writing, petitions for certiorari raising issues as to the meaning of testimonial under *Crawford* were pending before the Supreme Court in three cases: *Ferguson v. West Virginia*, no. 04-1328; *Davis v. Washington*, no. 05-5224; and *Hammon v. Indiana*, no. 05-5705.

State v. Manuel, 2005 WI 75, ¶ 39, __ Wis. 2d __, 697 N.W.2d 811, declined to choose among the three *Crawford* formulations. Instead, this court declared that "[f]or now, at a minimum," it was adopting all three formulations identified in *Crawford*. *Id.* at ¶ 39. Thus, the question is whether Julie's letter or her voicemail message qualifies as testimonial under any of the *Crawford* formulations.

1. Julie's letter is nontestimonial under *Crawford*.

The letter Julie wrote to the police (73:9; A-Ap. 136) is obviously not testimonial under the first two *Crawford* formulations. It is not "'*ex parte* in-court testimony or its functional equivalent'"; nor is the letter akin to "'formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" 541 U.S. at 51-52 (citation omitted). Rather, the only formulation of testimonial the letter conceivably satisfies is the one suggested by the National Association of Criminal Defense Lawyers in its amicus brief in *Crawford*: "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 52.

In finding the letter testimonial, the trial court did not explicitly say that the letter satisfied this formulation. The court instead focused on what it believed to be Julie Jensen's motive in writing it:

> [T]he purpose for which the utterance is made . . . is what dictates whether it's a testimonial statement or not. . . . [T]he circumstances in this case suggest that the letter was intended exclusively for accusatory and prosecutorial purposes. I can't imagine any other purpose in sending a letter to the police that is to be opened only in the event of her death . . . And even to the extent that it denies a suicidal intent, it is an integral part of the accusation to further show that it's an

> accusatory statement, and it even uses the word "suspect" in reference to the defendant.

(110:5.)

Contrary to the trial court's analysis, in determining whether a statement fits the third *Crawford* formulation, what matters is the expectation of a reasonable person in the declarant's position rather than the subjective purpose of the particular declarant. *See, e.g., United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005); *People v. Cage*, 15 Cal. Rptr. 3d 846, 855 (Cal. App. 4th 2004). Certain factual circumstances surrounding an out-of-court statement, including formalized settings such as police interrogations or the taking of statements under oath, create such an expectation. *Summers*, 414 F.3d at 1302.

The circumstances surrounding Julie's letter would not give rise to an expectation that the letter would be available for use at a later trial. Unlike a letter accusing a person of having already committed a crime, Julie's letter was an expression of fear that her husband *might* be planning her demise. When Julie wrote the letter, she was not anticipating a trial, for no crime had been committed. In fact, when Julie wrote the letter, she was hoping her suspicions were unfounded, and this is why she told Tadeusz Wojt to give the letter to police only in the event of her death (101:13-14).

That the letter was written when no crime had been committed is the main reason the statements in the letter are nontestimonial. The State is unaware of any case in which a declarant's statements to authorities about a crime the declarant suspects *might* be committed in the future have been deemed testimonial under *Crawford*. This is the reason the trial court was wrong to equate the suspicions expressed in Julie's letter with the hypothetical letter-writer who informs the police that a named person is stealing a newspaper every day (110:5).

Even if a statement speculating that a person might be contemplating a crime could be classified as

testimonial, here an objective witness would not have believed that the letter would be available for use at a later trial, given its rambling nature and the topics it covered. The letter, apparently prompted by Julie's discovery of a list Jensen had made in his daily planner, includes statements about the deterioration in the Jensens' relationship; Julie's extramarital affair; Jensen's use of the Internet; Julie's drinking habits and the medications she was taking; and her devotion to her sons (73:9; A-Ap. 136). An objective witness reading Julie's letter might believe that *if* Julie died suspiciously, and *if* her neighbor then gave her letter to police, it would cause the police to investigate whether Mark Jensen had a role in his wife's death. But when Julie wrote the letter, neither event had occurred. Moreover, the fact Julie did not write the letter at the request or suggestion of the police made it unlikely that an objective witness would reasonably believe the letter would be available for use at a later trial. *Cf. State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (finding victim's statements to police nontestimonial partly because she "went to the police station on her own, not at the demand or request of the police"). Thus, none of the circumstances surrounding the letter-writing would give rise to an expectation that the letter would be used as evidence at some future trial.

Even if Julie's subjective intent in preparing the letter were relevant in determining whether the statements in the letter are testimonial under the third *Crawford* formulation, the trial court's conclusion that Julie intended her letter to be used only for accusatory and prosecutorial purposes is unwarranted. The tenor of the letter (73:9; A-Ap. 136) strongly suggests that Julie wrote it to ensure that, if she died, her children would know she loved them so much that she would never have abandoned them by committing suicide. Had the letter been intended solely or primarily for accusatory and prosecutorial purposes, then Julie would have given it directly to the police, as she did with the roll of film she retrieved from Tadeusz Wojt (*see* 101:33, 44-45). But instead Julie gave the sealed letter to Wojt, instructing him to turn it over to police only if

something happened to her (*id.*:13-14). This suggests that her main purpose in writing the letter was to ensure that the circumstances of her death would not be misrepresented.

Because Julie did not write her letter under circumstances that would lead an objective witness to reasonably believe the letter would be available for use at a later trial, the trial court erred in finding the letter testimonial under *Crawford.*

2. Julie's voicemail message for Officer Kosman is nontestimonial under *Crawford.*

In addition to her November 21, 1998 letter, Julie Jensen left a voicemail message for Officer Ron Kosman on November 24, 1998, which the trial court found to be testimonial (*see* 30:5; 110:6). The crux of Julie's message was that her husband had been acting strange and leaving himself notes Julie had photographed, and that she wanted to speak with Kosman in person because she was afraid Jensen was recording her telephone conversations (30:5). The trial court reasoned that the voicemail was unlike a 911 call, which can be nontestimonial, because when Julie was greeted with a voicemail recording, she "didn't ask for an alternative where she could have gotten urgent assistance" (110:7).

As was the case with Julie's letter, her voicemail message clearly is nontestimonial under the first two *Crawford* formulations, because the voicemail is not *ex parte* in-court testimony or its functional equivalent, nor is the voicemail similar to formalized testimonial materials, such as affidavits. The only question is whether the voicemail statements were made under circumstances that would lead an objective witness to believe they would be available for use at a later trial.

All of the reasons for why Julie's letter is nontestimonial apply with equal or greater force to her voicemail message. Unlike her letter, Julie's voicemail did not suggest that Jensen might be plotting a crime, so there is even less reason an objective witness would reasonably believe the voicemail would be available as evidence at a later trial. Finally, a voicemail message is more informal than a letter and therefore more removed from the types of formalized testimonial materials normally viewed as testimonial than a letter would be.

The trial court therefore erred in excluding Julie's voicemail message on the ground it was testimonial.

II. ASSUMING JULIE JENSEN'S LETTER TO POLICE AND HER VOICEMAIL MESSAGE ARE TESTIMONIAL, THESE STATEMENTS SHOULD BE ADMITTED UNDER THE DOCTRINE OF FORFEITURE BY WRONGDOING IF THE TRIAL COURT FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT JENSEN KILLED HIS WIFE.

As an alternative to arguing that Julie Jensen's oral statements to Officer Kosman and her letter to police were nontestimonial, the prosecutor contended that the statements should be admitted under the doctrine of forfeiture by wrongdoing. Specifically, the prosecutor urged the trial court to admit Julie's statements if the State could prove, by a preponderance of the evidence, that Jensen murdered his wife (*see* 89:10-14).

The trial court, however, cited several reasons why forfeiture by wrongdoing was not applicable here: 1) there was no preexisting charge against Jensen when Julie made her statements; 2) no reported case allowed a declarant's statements to be admitted against the accused in a prosecution for her murder pursuant to this principle;

and 3) applying forfeiture by wrongdoing here would render the hearsay exception for dying declarations superfluous. *See* 97:4-6; 110:9, 19-21.

In urging this court to apply forfeiture by wrongdoing to render statements of a deceased declarant admissible against the defendant in a prosecution for her murder, the State will respond to each of the trial court's concerns. The State will also address Jensen's contention – raised in the courts below – that the doctrine should be limited to situations where the defendant renders the declarant unavailable in order to prevent her from testifying. But before addressing the trial court's and Jensen's objections to applying forfeiture by wrongdoing here, the State will briefly discuss the historical development of this doctrine.

A. The principle that a criminal defendant may forfeit his confrontation rights by wrongfully procuring the unavailability of a witness was incorporated in the Confrontation Clause in 1791, and *Crawford* acknowledged the continued vitality of this principle.

The Sixth Amendment right to confrontation "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. at 54; *see Mattox v. United States*, 156 U.S. 237, 243 (1895). Thus, the *Crawford* Court observed that if a particular out-of-court statement would have been admissible in 1791, the Constitution does not necessarily bar its admission. *Id.* at 55.

The Court recognized that the Confrontation Clause may have incorporated two common-law departures from the rule that out-of-court testimonial statements are inadmissible unless the defendant had a prior opportunity

to cross-examine their maker: the hearsay exception for dying declarations,[4] 541 U.S. at 55 n.6, and the rule of forfeiture by wrongdoing, *id.* at 62.

Unlike dying declarations, the circumstances of which are thought to provide an alternative to cross-examination as a way of assessing reliability, the rule of forfeiture by wrongdoing does not purport to be a surrogate for determining a statement's reliability. *Crawford*, 541 U.S. at 62. Rather, forfeiture by wrongdoing is a rule that "extinguishes confrontation claims on essentially equitable grounds." *Id.* Application of the rule depends on the defendant's conduct and is divorced from any notion of reliability. Forfeiture by wrongdoing therefore differs from the usual Confrontation Clause exceptions, whose features are believed to enhance their reliability.

The forfeiture rule has been a fixture of the common-law right to confrontation since at least 1666. *See Lord Morley's Case*, 6 How. St. Tr. 769 (1666). There Lord Morley was brought to trial in the House of Lords for murdering a man in a dispute outside a tavern. On the eve of trial, all the judges of England gathered to settle principles of law for the Lords to apply. *Id.* at 770. At this meeting, the judges resolved that:

> [A]ny witness who had been examined by the coroner, and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the Judges asked whether such examination might be read; we should answer, that if their lordships were satisfied by the evidence they had heard, that the witness was detained by means or procurement of the prisoner, then the examination might be read; but whether he was

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[4]Although many dying declarations are not testimonial, the Court cited ample historical authority for admitting even those that are. 541 U.S. at 56 n.6. Ultimately, the Court declined to decide whether the Sixth Amendment incorporates an exception for testimonial dying declarations, but it did observe that "[i]f this exception must be accepted on historical grounds, it is *sui generis*." *Id.*

> detained by means or procurement of the prisoner, was matter of fact of which we were not Judges, but their lordships.

Id. at 770-71. In other words, the Lords would decide as a preliminary matter whether Lord Morley had wrongfully procured the witness's absence. If the evidence satisfied them that he had, then that witness's statements to the coroner would be admissible.[5] Although the Lords ultimately found that Lord Morley had not wrongfully procured the absence of any such witness, the rule lived on in English common law. *See Proceedings in Parliament Against Sir John Fenwick*, 13 How. St. Tr. 537, 578-83 (1696); *see also Harrison's Case*, 12 How. St. Tr. 851, 852 (1692), and *Regina v. Scaife*, 117 Eng. Rep. 1271, 1273 (Q.B. 1851).

In the first United States Supreme Court case directly addressing the Confrontation Clause, *Reynolds v. United States*, 98 U.S. 145 (1878), the Court cited *Lord Morley's Case* with approval, declaring:

> The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds, 98 U.S. at 158.

In the century after *Reynolds*, the Supreme Court has endorsed the principle that a criminal defendant can forfeit through misconduct the rights guaranteed by the Confrontation Clause, although not in the context of

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[5]The holding of *Lord Morley's Case* has been described as "uncrossed depositions given to the coroner are admissible at trial if the prosecution can prove to the trier of fact's satisfaction that the defendant procured the witness's absence." John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. Rev. 835, 890 (1996).

deciding the admissibility of an absent witness's prior statement in the face of the defendant's confrontation objection. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant can lose right to be present at trial by continuing disruptive conduct following a warning); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) ("[n]o doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct"). *Crawford* is the first case involving the admission of an unavailable declarant's out-of-court statement in which the Court voiced its acceptance of the rule of forfeiture by wrongdoing.

Unlike the dearth of Supreme Court authority, there is abundant precedent from the federal appellate courts and from over a dozen state courts that have adopted some version of forfeiture by wrongdoing. On the federal side, the first United States Court of Appeals to adopt the doctrine was the Eighth Circuit in *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976). There the court held that where the defendant had intimidated a witness to prevent him from testifying at trial, the defendant voluntarily waived his Sixth Amendment right to confrontation, thereby allowing the witness's grand jury testimony to be admitted. The witness, Tindall, had testified before the grand jury which was investigating various narcotics violations involving Carlson and others. *Id.* at 1352. Despite receiving use immunity for his trial testimony, Tindall refused to testify and was held in contempt. *Id.* at 1353. After hearing evidence strongly suggesting that Carlson had directed threats and intimidating overtures toward Tindall, the district court allowed Tindall's grand jury testimony to be admitted. *Id.* On appeal, the Eighth Circuit sidestepped the question of whether the admission of grand jury testimony violates an accused's right to confrontation; instead, the court concluded that Carlson had waived his confrontation rights:

> Carlson would have been able to confront Tindall at trial had he not taken steps to assure Tindall's "unavailability" at trial. "(The defendant) cannot now be heard to

> complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial."

547 F.2d at 1359 (citation omitted).

After the Eighth Circuit adopted the doctrine in *Carlson*, the majority of other federal appellate courts followed suit. *See United States v. White*, 116 F.3d 903, 911-12 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1279-82 (1st Cir. 1996); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985); *United States v. Thevis*, 665 F.2d 616, 630-33 (5th Cir. 1982); *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979). Subsequently, the rule of forfeiture by wrongdoing was codified in the Federal Rules of Evidence in 1997 as an exception to the hearsay rule. *See* Fed. R. Evid. 804(b)(6).[6]

Although the application of forfeiture by wrongdoing is not as widespread among state courts, at least thirteen states and the District of Columbia have embraced some version of the doctrine. *See State v. Valencia*, 924 P.2d 497, 502 (Ariz. Ct. App. 1996); *People v. Giles*, 19 Cal.

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[6]The rule provides as follows:

> **Rule 804. Hearsay Exceptions; Declarant Unavailable**
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> . . . .
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> **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> **(6) Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Rptr. 3d 843 (Cal. App. 2d 2004); *People v. Moore*, 117 P.3d 1 (Colo. Ct. App. 2004); *State v. Henry*, 820 A.2d 1076, 1087-88 (Conn. App. Ct. 2003); *Devonshire v. United States*, 691 A.2d 165, 168-69 (D.C. 1997); *State v. Hallum*, 606 N.W.2d 351, 356-59 (Iowa 2000); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004); *Commonwealth v. Edwards*, 830 N.E.2d 158 (Mass. 2005); *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004); *State v. Sheppard*, 484 A.2d 1330, 1345 (N.J. Super. Ct. Law Div. 1984); *State v. Alvarez-Lopez*, 98 P.3d 699 (N.M. 2004), *cert. denied*, 125 S. Ct. 1334 (2005); *People v. Geraci*, 649 N.E.2d 817 (N.Y. 1995); *Commonwealth v. Paddy*, 800 A.2d 294, 310 (Pa. 2002); *Gonzalez v. State*, 155 S.W.3d 603, 610-11 (Tex. Crim. App. 2004).

The above discussion reveals that the principle of forfeiture by wrongdoing is well-ensconced in modern American jurisprudence. In fact, the court in *Commonwealth v. Edwards* recently observed that "no jurisdiction . . . after considering the doctrine, has rejected it." 830 N.E.2d at 166-67.

Admittedly, the parameters of the doctrine vary from one jurisdiction to the next, sometimes dictated by a legislative enactment. In the wake of *Crawford*, however, the State urges this court to adopt a broad version of forfeiture by wrongdoing and hold that if the trial court finds as a preliminary matter that Jensen murdered his wife, he cannot complain about admission of her statements on confrontation grounds, even if those statements are deemed testimonial. The State will next discuss the rationale and case law supporting its position.

B. Cases predating and postdating *Crawford* have invoked forfeiture by wrongdoing even when the defendant's conduct that rendered the witness unavailable was the same conduct for which the defendant was on trial and occurred before any prosecution was pending.

In rejecting the prosecutor's argument that forfeiture by wrongdoing should apply to the admission of Julie Jensen's statements, the trial court saw a major distinction between this case and cases like *United States v. White*, 116 F.3d 903: in *White* the defendants were already facing criminal charges, and they murdered the declarant to prevent him from testifying against them (110:8-9). The trial court noted that in *White* it would have been necessary to prove the declarant's murder to establish his unavailability to testify on the drug charges, so it made sense to join the murder and drug cases for trial (*id.*:9). The trial court further remarked that

> [T]here's no reported case . . . certainly not a murder case, where there's a declarant's out-of-court statement—testimonial statement. . . [that] has been admitted in the murder prosecution on the basis of waiver or forfeiture by committing the murder.

(110:9.)

Contrary to the trial court's belief, forfeiture by wrongdoing has been invoked even where charges were not pending against the defendant when he murdered the declarant and even where the goal of the murder was not to prevent the declarant from testifying against the defendant. Moreover, there are reported cases in which a defendant on trial for murder was found to have forfeited his confrontation rights vis-à-vis statements of the victim by murdering him or her.

For example, in *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999), the court held that in his trial for

killing a federal informant, Christine Elkins, Emery had forfeited Confrontation Clause and hearsay objections to the admission of Elkins' statements when he rendered her unavailable by murdering her. While Emery's purpose in murdering Elkins was to end her cooperation with federal authorities – and this would include testifying against Emery in the future – no charges were pending when he killed Elkins. The court rejected Emery's argument that forfeiture by wrongdoing should only apply in the trial of the crimes about which he feared Elkins would testify and not in a trial for her murder. 186 F.3d at 926.

While *Emery* refutes the trial court's belief that forfeiture by wrongdoing applies only where charges are pending when the defendant renders a witness unavailable, *United States v. Miller*, 116 F.3d 641, 668 (2d Cir. 1997), also belies the trial court's misconception that this principle is confined to defendants who want to prevent the declarant from testifying. In *Miller*, the court refused to limit the rule of waiver by misconduct it had first announced in *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), to situations in which a criminal action is pending and the defendant intends to prevent the declarant from testifying:

> We have never indicated that *Mastrangelo* did not apply to a defendant's procurement of the unavailability of the declarant unless there was an ongoing proceeding in which the declarant was scheduled to testify, and we see no reason to do so now. Although a "finding that [defendants'] purpose was to prevent [a declarant from] testifying," *United States v. Thai*, 29 F.3d at 815, is relevant, such a finding is not required.

Id. The murdered declarants in *Miller*, Fernando Suarez and Gus Rivera, were not killed with the intent to prevent them from testifying. Rather, Rivera was murdered because the Supreme Team gang decided that he "was more of a liability than an asset." 116 F.3d at 654. As for Suarez, a Columbian who supplied cocaine to the gang, his murder by bludgeoning resulted from the gang's decision to steal his cocaine rather than buy it. *Id.*

While *Emery* and *Miller* predate *Crawford*, post-*Crawford* cases have also applied forfeiture by wrongdoing where no prosecution was pending when the defendant rendered the declarant unavailable. The earliest post-*Crawford* case to do so is *State v. Meeks*, 88 P.3d 789.

Meeks was convicted of first-degree premeditated murder for shooting James Green. Shortly after Green was shot, a police officer asked Green who had shot him, and Green replied, "'Meeks shot me.'" Recognizing that *Crawford* (decided while Meeks' appeal was pending) controlled the outcome of Meeks' confrontation claim, the Kansas court acknowledged that "Officer Hall was arguably conducting an interrogation when he asked Green if he knew who shot him, thus making the response testimonial." 88 P.3d at 793. However, the court deemed it unnecessary to determine if Green's response was testimonial, instead finding that "Meeks forfeited his right to confrontation by killing the witness, Green." *Id.* at 793-94. To support its holding, the court cited an amicus brief in *Crawford* that was filed by a group of law professors, including Professor Richard Friedman, who argued that it is permissible to invoke forfeiture by wrongdoing even where the act with which the accused is charged is the same act by which the accused is alleged to have rendered the witness unavailable. *Id.* at 794.

Meeks contradicts the trial court's view that forfeiture by wrongdoing applies only where there are pending charges and only when the defendant procures the declarant's absence with the intent to prevent him from testifying. *Meeks* is also an example of a court admitting an arguably testimonial statement against a murder defendant on the theory that he lost his right to confrontation by murdering the victim.

Most recently, the district court in *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005), held that, although testimonial, a murder victim's audiotaped statement was admissible against Mayhew in his trial on

federal kidnapping and murder charges because he had forfeited his right to confrontation by murdering her. The declarant, Kristina McKibben, was interviewed by a police officer during an ambulance ride to the hospital, where she died. *Id.* at 963. In her audiotaped conversation with the officer, McKibben said that Mayhew had killed her mother and her mother's fiancé and then kidnapped her. *Id.*

In ruling on Mayhew's motion to exclude McKibben's statement on confrontation grounds, the court concluded that forfeiture by wrongdoing applies even though the act rendering the declarant unavailable is the same offense of which the defendant stands accused. *Id.* at 967. While acknowledging that, at first glance, it might seem "troublesome" to ask the trial court to decide by a preponderance of the evidence whether defendant committed the same crime for which he is on trial, *id.* at 967-68, the district court stated that several "tenets of evidentiary law" supported its conclusion that the forfeiture doctrine applies in this scenario. First, this application ensures that a defendant will receive no benefit from his wrongdoing. Second, the jury will never learn of the judge's preliminary finding and will use different evidence and a different burden of proof in deciding guilt. Third, analogous evidentiary situations – such as determining the existence of a conspiracy – permit a judge to determine preliminary facts even though the same facts may be necessary to the jury's ultimate verdict. *Id.* at 968. Finding by a preponderance of the evidence that Mayhew's actions had rendered McKibben unavailable, the court ruled her audiotaped statement admissible against Mayhew. *Id.*

Meeks and *Mayhew* are not the only post-*Crawford* cases to apply forfeiture by wrongdoing where the defendant is standing trial for the same murder that rendered the witness unavailable. The same application occurred in *People v. Giles*, 19 Cal. Rptr. 3d 843 (defendant convicted of murdering his former girlfriend forfeited confrontation objection to admission of her

hearsay statements regarding prior domestic violence)[7]; *People v. Moore*, 117 P.3d 1 (defendant convicted of negligent homicide of wife forfeited confrontation objection to admission of her statement implicating Moore in prior domestic violence); and *Gonzalez v. State*, 155 S.W.3d 603 (by shooting the victim, capital murder defendant forfeited confrontation right with respect to her statements to police describing the shooter and his residence).

The foregoing cases reveal that courts both before and after *Crawford* have applied forfeiture by wrongdoing even where no charges were pending against the defendant when he rendered the declarant unavailable and even where the defendant was on trial for the same conduct that caused the declarant's unavailability. Thus, insofar as the trial court refused to apply forfeiture by wrongdoing in Jensen's case because it believed that no court had invoked the rule under these circumstances, that belief is erroneous.

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[7]On December 22, 2004, the California Supreme Court accepted review of *Giles* and *People v. Jiles*, 18 Cal. Rptr. 3d 790 (Cal. App. 4th 2004), another post-*Crawford* decision involving forfeiture by wrongdoing. In *Jiles*, the appellate court held that the victim's statement to a police officer, identifying her husband as the person who stabbed her, was admissible after *Crawford* regardless of whether the trial court had admitted the statement as a dying declaration or a spontaneous utterance. *Id.* at 795-96. The court relied on *Crawford*'s statement that the rule of forfeiture by wrongdoing "'extinguishes confrontation claims on essentially equitable grounds.'" *Id.* at 795-96.

The State recognizes that *Giles* and *Jiles* are unpublished decisions. However, as the court of appeals recently observed in *State v. Stenzel*, 2004 WI App 181, ¶ 18 n.6, 276 Wis. 2d 224, 688 N.W.2d 20, Wis. Stat. § (Rule) 809.23(3) does not prohibit citation to unpublished opinions from other jurisdictions. In addition, the State cites *Giles* and *Jiles* not for their precedential value but to illustrate that the doctrine of forfeiture by wrongdoing has been applied even where the defendant is on trial for the same criminal conduct which rendered the declarant unavailable, and the statement at issue is testimonial under *Crawford*.

C. This court should not limit the doctrine of forfeiture by wrongdoing to situations where the defendant rendered the declarant unavailable with the intent to prevent her from testifying.

In his court of appeals' brief, Jensen argued that even if this court were to recognize the doctrine of forfeiture by wrongdoing, the doctrine only applies where the defendant's misconduct was intended to prevent the declarant from testifying. This contention – which Jensen will likely resurrect in this court – may be valid in some jurisdictions, particularly where the doctrine has been codified and includes such an intent requirement. However, Jensen's contention is not universally true, and for the reasons discussed below, this court should adopt a version of forfeiture by wrongdoing which is not so limited.

As the Second Circuit observed in *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001), the plain language of Fed. R. Evid. 804(b)(6)[8] requires a finding that the defendant acted with intent to make the declarant unavailable as a witness. Thus, it is no wonder that federal cases applying forfeiture by wrongdoing under this rule, which became effective in December 1997, require that the defendant's wrongdoing must have been intended, at least in part, to render the declarant unavailable as a witness. *See, e.g., United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005); *United States v. Johnson*, 219 F.3d 349, 355-56 (4th Cir. 2000). Similarly, it is not surprising that courts in states which have adopted a counterpart to the federal rule have limited the misconduct exception to a defendant's wrongdoing that was intended to make the declarant unavailable to testify as a witness. *See, e.g., Commonwealth v. Laich*, 777 A.2d 1057, 1062 n.4 (Pa. 2001) (applying Pa. R.E. 804(b)(6)).

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[8] *See* n.6 *supra.*

However, where no rule of evidence limits the scope of forfeiture by wrongdoing, some courts have held that the defendant need not have acted with the intent to procure the declarant's unavailability as a witness for the rule to apply. The Sixth Circuit in *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005), is one of those courts:

> Though the Federal Rules of Evidence may contain such a requirement . . . the right secured by the Sixth Amendment does not depend on, in the recent words of the Supreme Court, "the vagaries of the Rules of Evidence." *Crawford*, 124 S. Ct. at 1370. The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.

Id. at 370-71. There the court held that Garcia-Meza had forfeited his confrontation rights by murdering the declarant.[9]

Likewise, in *Gonzalez v. State*, 155 S.W.3d 603,[10] the court rebuffed Gonzalez's argument that a defendant forfeits his right to confrontation through wrongdoing only when he is charged with or under investigation for a crime, and wrongfully procures the unavailability of a witness with intent to prevent the witness from testifying about that crime. *Id.* at 610-11. Saying that it saw no reason to limit the doctrine in the manner suggested, the court observed,

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[9]Unlike the situation here, Garcia-Meza admitted that he stabbed his wife to death, so the trial court did not have to hold a hearing to determine if he had procured her unavailability.

[10]The statements at issue in *Gonzalez* were made by one of the two shooting victims to police immediately after the incident.

> A defendant whose wrongful act renders a witness unavailable for trial benefits from his conduct if he can use the witness's unavailability to exclude otherwise admissible hearsay statements. This is true whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.

155 S.W.3d at 611.

The California court in *People v. Giles*, 19 Cal. Rptr. 3d at 848, employed the same logic in dismissing the argument that a defendant forfeits his confrontation rights via wrongdoing only when he has been charged with, or is under investigation for, a crime and procures the witness's unavailability with the intent of preventing the witness from testifying.

Contrary to Jensen's assertion in the court of appeals, there is nothing unconstitutional about expanding the doctrine of forfeiture by wrongdoing so that it applies even if the defendant's misconduct in murdering a declarant was not motivated by an intent to prevent her from testifying. The motive for the murder – whether it be hatred of the victim, financial incentive, or a desire to prevent the victim from testifying – has no relationship to the quality of the evidence admitted under the forfeiture doctrine. Unlike true exceptions to the hearsay rule, which are thought to provide alternatives to confrontation as a means of assessing reliability, the forfeiture rule "does not purport to be an alternative means of determining reliability." *Crawford*, 541 U.S. at 62. And, regardless of the defendant's motivation, the same equitable principle – that no person should benefit from his wrongdoing[11] – is implicated whenever a defendant raises a confrontation objection to admission of an out-of-

[11]Professor Friedman believes a more accurate statement of the principle is that an accused cannot complain about a situation he has created by his wrongdoing. *See* http://confrontationright.blogspot.com, posting of Friday, August 19, 2005, 1:09 p.m.

court statement of a declarant whose unavailability the defendant procured through misconduct.

Broadening the scope of forfeiture by wrongdoing is particularly important in the post-*Crawford* era. As three members of this court observed in *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637, "Because the effect of the *Crawford* decision is to exclude certain testimonial hearsay that heretofore was thought to be admissible, it is vital for courts to enforce the exception to assure the integrity of criminal trials." *Id.* at ¶ 94 (Prosser, J., concurring).[12]

In the same vein, Professor Friedman has urged that "a robust doctrine of forfeiture is essential to developing a satisfactory law of confrontation; otherwise, the courts will find themselves irresistibly tempted to put beyond the scope of the Confrontation Clause statements that clearly should be characterized as testimonial." *See* http://confrontationright.blogspot.com, posting of Friday, August 19, 2005, 1:09 p.m. *Accord United States v. Arnold*, 410 F.3d 895, 917 (6th Cir. 2005) (Sutton, J., dissenting) ("Nor can the significance of this exception [forfeiture by wrongdoing] to the Confrontation Clause be overstated in the aftermath of *Crawford*").

This court's unwillingness to broaden the reach of the forfeiture doctrine in the wake of *Crawford* would undoubtedly have an adverse effect on the prosecution of crimes arising from domestic violence. If the forfeiture doctrine is applied as narrowly as Jensen advocates, then a domestic violence victim who dies from her injuries after

[12]Admittedly, the *Hale* concurrence declared that forfeiture by wrongdoing "is essential because it discourages defendants from killing, kidnapping, secreting, terrorizing, blackmailing, or conspiring with critical witnesses so that they become unavailable to testify," 277 Wis. 2d 593, ¶ 93, suggesting that the defendant's misconduct must have been intended to prevent the declarant from testifying. However, because forfeiture by wrongdoing was not at issue in *Hale*, there was no reason to discuss whether the doctrine should apply when the misconduct that renders the declarant unavailable has other motivations, e.g., hatred of the declarant.

giving a testimonial statement to police will be silenced in the courtroom if the defendant's intent in killing her was to punish her for deserting him and not to prevent her from testifying. Such a result would be intolerable.

While many of the forfeiture cases predating the 1997 enactment of Fed. R. Evid. 804(b)(6) also required a showing that the defendant rendered the declarant unavailable with the intent to prevent her from testifying, these cases were decided before *Crawford* made application of the doctrine crucial in situations where it had not previously been needed to admit critical testimonial hearsay. Therefore, this court should not feel constrained to limit the doctrine as many pre-*Crawford* decisions did, particularly since Wisconsin has not adopted an evidentiary rule similar to Fed. R. Evid. 804(b)(6).

For all these reasons, this court should reject Jensen's urging to limit forfeiture by wrongdoing to situations where the defendant procured the declarant's unavailability with the intent to prevent her from testifying.

D. Extending the principle of forfeiture by wrongdoing to the present situation would not render the hearsay exception for dying declarations superfluous.

Another reason the trial court refused to apply forfeiture by wrongdoing to determine if Julie's letter and her voicemail should be admissible was the court's belief that this would create a conflict with the hearsay exception for dying declarations:

> If an accused forfeits or waives the right of cross-examination merely by killing the victim to "put her out of the way," then there would have been no reason for the development of the Dying Declaration Rule, which contains the added requirement that the declarant's

> statement have been made "while believing that the declarant's death was imminent."

(97:5; A-Ap. 105.)

Contrary to the trial court's perception, the hearsay exception for dying declarations has always been wholly separate from the doctrine of forfeiture by wrongdoing. And, although at times the same statement will be admissible as a dying declaration or pursuant to the forfeiture doctrine, this is not always true, even under the State's theory of admissibility. Rather, as the following discussion illustrates, each exception has a different rationale and there are no inherently overlapping elements other than the unavailability of the witness.

1. The admissibility of dying declarations depends on the declarant's mental state and the statement's content, while forfeiture by wrongdoing focuses on the defendant's conduct and does not depend on the content of the statements.

Statements cannot be received as dying declarations unless they are made in belief of impending death. *Oehler v. State*, 202 Wis. 530, 534, 232 N.W. 866 (1930); Wis. Stat. § 908.045(3). The pivotal question in determining if a statement is a dying declaration is whether the declarant, in fact, believed he was dying when he made the statement. *People v. House*, 566 N.E.2d 259 (Ill. 1990). Thus, the declarant's mental state when the statements were made, rather than any conduct by the accused, determines if a statement is a dying declaration. *Mattox v. United States*, 146 U.S. 140, 152 (1892).

Dying declarations are admissible under the theory that "the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath

could impose." *Mattox*, 146 U.S. at 152. Therefore, the court must reject the statements unless the circumstances show that the declarant truly realizes "the awful and solemn situation in which he is placed." *Id.*

By contrast, the defendant's conduct is the critical factor in applying forfeiture by wrongdoing. The court must make a factual determination of whether the defendant actually procured the declarant's unavailability by wrongful conduct. Wrongful conduct "obviously includes the use of force and threats, but . . . has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant's direction to a witness to exercise a fifth amendment privilege." *Steele v. Taylor*, 684 F.2d at 1201 (footnote omitted). The declarant's mental state is largely irrelevant to such an inquiry.[13] This is because the principle of forfeiture rests on the equitable maxim that "no one shall be permitted to take advantage of his own wrong" (*Reynolds v. United States*, 98 U.S. at 159), rather than on the truthfulness and reliability spurred by the "awful and solemn situation" of a declarant's subjective sense of inescapable doom. *See Mattox v. United States*, 146 U.S. at 152.

Another distinction between dying declarations and statements admitted under forfeiture by wrongdoing is that the former are content-dependent whereas the latter are not. Pursuant to Wis. Stat. § 908.045(3), a dying declaration must be about the "cause" or "circumstances" of the expected imminent death. By contrast, the content of statements admitted under principles of forfeiture is limited only by evidentiary rules such as Wis. Stat. § 904.03.

The trial court overlooked the above distinctions between the dying declaration exception and forfeiture by

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[13]The declarant's mental state may be incidentally relevant if the State is alleging that the defendant made the victim unavailable through intimidation. Even so, the central focus of such an inquiry is whether the defendant actually *intimidated* the declarant into silence.

wrongdoing when it refused to apply the rule to Julie's statements. Because of these distinctions, a statement admissible as a dying declaration may not be admissible under the rule, and a statement admissible under the rule may not qualify as a dying declaration. This principle is illustrated in detail below.

2. Although the two exceptions may occasionally overlap, evidence will often qualify for admissibility under one exception, but not the other.

Applying the forfeiture-by-wrongdoing rule in circumstances such as those present here would not render the exception for dying declarations superfluous. Although the exceptions may occasionally overlap, a statement will often be admissible under one exception but not the other, as this case illustrates.

Neither Julie's letter nor her voicemail to Officer Kosman meets the threshold requirement for the dying declaration exception because there is no evidence she made either statement under a belief of impending death. In the letter, she wrote, "I pray I'm wrong & nothing happens . . . but I am suspicious of Mark's suspicious behaviors & fear for my early demise" (73:9; A-Ap. 136). The quoted language indicates that Julie was afraid, but it hardly evinces the "certain expectation of almost immediate death" necessary to show that she truly realized "the awful and solemn situation in which [s]he is placed." *See Mattox*, 146 U.S. at 152.

Likewise, nothing contained in Julie's voicemail to Officer Kosman suggests she believed she was dying when she left the message. Thus, neither her voicemail message nor her letter is admissible as a dying declaration.

Julie's belief, however, is irrelevant in determining whether her statements should be admitted against Jensen

under the doctrine of forfeiture by wrongdoing. Rather, to determine if Jensen forfeited his confrontation rights with respect to these statements, the trial court must examine the evidence establishing his conduct. In this case, the challenged statements are not dying declarations but may very well be admissible under the forfeiture doctrine.

In other situations, the opposite may be true. Imagine, for example, a prosecution for attempted homicide. The victim, believing he is near death when the police arrive, tells them the defendant shot him. The victim later recovers from his gunshot wounds but is subsequently hit by a bus and dies before trial.

In the defendant's trial for the attempted homicide, the victim's statement to police would be admissible as a dying declaration, because he subjectively believed that death was imminent and made statements concerning the cause of what he believed to be his impending death.[14] However, because the victim recovered from his wounds, the intervening bus, rather than the defendant, caused the victim's unavailability as a witness. The defendant did not forfeit his right to confrontation by wrongfully procuring the victim's absence. In this scenario, the statements would be admissible as dying declarations but not under forfeiture by wrongdoing.

Insofar as the trial court refused to apply forfeiture by wrongdoing to determine the admissibility of Julie's testimonial statements because the court believed this would conflict with the hearsay exception for dying declarations, the trial court was mistaken.

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[14]The Wisconsin statute governing admissibility of dying declarations is broader than the federal rule. Under Wis. Stat. § 908.045(3), a dying declaration may be admissible if it is relevant. By contrast, under Fed. R. Evid. 804(b)(2), a dying declaration is not admissible unless relevant in a homicide prosecution.

E. If this court agrees that forfeiture by wrongdoing applies here, the State should have to convince the trial court by a preponderance of the evidence that Jensen killed his wife as a prerequisite to admission of her statements.

If this court agrees that the doctrine of forfeiture by wrongdoing applies under the circumstances present here, this court will have to decide how the question of forfeiture should be resolved. In particular, this court must select the burden of proof the State must satisfy to enable the trial court to find that Jensen has forfeited his confrontation rights with respect to his deceased wife's statements.

Fortunately, the federal appellate courts and the courts of sister states provide abundant guidance in this area. Based on that case law, which is discussed below, the State submits that the question of whether Jensen forfeited his right to confrontation with respect to Julie's statements should be decided by the trial court outside the jury's presence, with the State having the burden to establish forfeiture by a preponderance of the evidence.

Those federal appellate courts to address the issue have uniformly adopted preponderance of the evidence as the standard for determining, as a preliminary matter, whether the defendant is responsible for a declarant's unavailability. *See United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002); *United States v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001); *United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000); *United States v. Emery*, 186 F.3d at 927; *United States v. White*, 116 F.3d at 911-12; *United States v. Houlihan*, 92 F.3d at 1280; *United States v. Aguiar*, 975 F.2d at 47; *Steele v. Taylor*, 684 F.2d at 1202. While the court in *United States v. Thevis*, 665 F.2d at 630, noting "the intimate association between the right to confrontation and the accuracy of the fact-finding process," *id.* at 631, rejected the Government's argument

that the preponderance standard should apply, *Thevis* is no longer good law after *Zlatogur*.[15] Thus, no federal appellate court requires the Government to satisfy the more stringent clear-and-convincing-evidence standard to establish forfeiture by wrongdoing, even where the right to object based on confrontation – rather than hearsay – is involved.

Similarly, state appellate courts applying the doctrine of forfeiture by wrongdoing are nearly unanimous in using the preponderance standard. *See, e.g., State v. Valencia*, 924 P.2d at 503; *State v. Hallum*, 606 N.W.2d at 355-56; *State v. Meeks*, 88 P.3d at 794; *Commonwealth v. Edwards*, 830 N.E.2d at 172; *State v. Sheppard*. 484 A.2d at 1347-48; *State v. Alvarez-Lopez*, 98 P.3d at 704. The sole exception appears to be New York, which adopted the clear-and-convincing standard in *People v. Geraci*, 649 N.E.2d at 821.

In the following section, the State will show why this court should align itself with the overwhelming majority of courts that have adopted the preponderance standard in deciding whether a defendant has forfeited his right to raise hearsay and/or confrontation objections to the statement of an unavailable declarant.

1. Adoption of the preponderance standard is consistent with Wisconsin statutory and case law.

Choosing the preponderance standard would not only align this court with the federal and state courts enumerated above; it would also be consistent with Wis. Stat. § 901.04(1) and *State v. Frambs*, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990).

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[15] *Zlatogur* rejected the *Thevis* standard, finding it was superseded by Fed. R. Evid. 804(b)(6), which adopted the preponderance standard subsequent to *Thevis*. *See* 271 F.3d at 1028.

Frambs sought to introduce the exculpatory statements of an unavailable witness to support Frambs' theory that the witness and another man had beaten and robbed the victim and then wrongfully implicated Frambs. 157 Wis. 2d at 702-03. The State moved to bar the statements on the ground the witness was not unavailable under Wis. Stat. § 908.04(2)[16] because Frambs' threats had intimidated the witness and made him unavailable to testify. 157 Wis. 2d at 703. At a hearing to decide whether the witness's hearsay statements would be admissible, the trial court found by a preponderance of the evidence that Frambs' misconduct had caused the witness's unavailability and therefore barred the admission of his hearsay statements. *Id.*

On appeal, Frambs argued that the trial court should have required the State to show by clear and convincing evidence that his misconduct caused the witness's unavailability. *Id.* at 705. The court of appeals rejected Frambs' argument, holding that the preponderance-of-the-evidence standard should apply. *Id.* at 705-06.

Unlike the situation here, Frambs' waiver of his right to confrontation was not at issue. Rather, Frambs sought to admit hearsay statements of an unavailable declarant, and the State resisted their admission on the ground Frambs had caused the declarant's unavailability. Nevertheless, there is no reason to believe the appeals court would have used a different standard had the State been attempting to introduce the unavailable declarant's statements, with Frambs resisting their admission. First, the court of appeals was applying § 901.04(1), which also applies to the preliminary determination of whether Jensen

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[16]That statute provides as follows:

> **(2)** A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

forfeited his confrontation right with respect to Julie's statements. Second, by adopting the reasoning of a case which involved the defendant's forfeiture of his confrontation right, the appellate court signaled its agreement that the preponderance standard would apply in that situation.

For these reasons, adoption of the preponderance standard would square with § 901.04(1) and *Frambs*.

2. Logically, the same standard that is used for determining the admissibility of a coconspirator's statements should be used for determining forfeiture by misconduct.

Apart from being consistent with *Frambs*, there are compelling reasons for requiring the State to show by a preponderance of the evidence that the defendant by his wrongdoing has forfeited his right to confrontation. The court in *United States v. White*, 116 F.3d 903, discussed some of those reasons in explaining why *Thevis* was wrong in analogizing the forfeiture determination to the decision whether to admit a courtroom identification following a tainted lineup identification:

> Although the main purpose of the confrontation clause is to ensure the reliability of the evidence, it does not follow that every ruling on every related issue, even if it may expose the defendant to uncross-examined testimony, must rest on clear and convincing evidence. . . . The forfeiture principle, as distinct from the confrontation clause, is designed to prevent a defendant from thwarting the normal operation of the criminal justice system. . . . [T]he forfeiture finding is the functional equivalent of the predicate factual finding that a court must make before admitting hearsay under the co-conspirator exception. . . . Under Fed.R.Evid. 801(d)(2)(E), the government need prove its threshold burden for that purpose . . . only by a preponderance. *Bourjaily v. United States*, 483 U.S. 171, 175-76, 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987). Although

> *Bourjaily* does not expressly consider the standard of proof on a confrontation clause claim, the discussion does cite constitutional cases liberally in selecting the preponderance standard, and a later passage in the decision rejects a generalized claim that the admission of co-conspirator statements under Rule 801(d)(2)(E) violates that clause. *Id.* at 181-84, 107 S. Ct. at 2781-83. As a higher standard of proof under the forfeiture doctrine would not actually separate out the more from the less reliable hearsay and admit only the former (it would simply reduce the scope of the doctrine's application), and as the public interest in deterring this sort of mischief is great, we think it correct to use the same standard as is used for coconspirators' statements.

116 F.3d at 912. *Accord Devonshire v. United States*, 691 A.2d at 169; *Commonwealth v. Edwards*, 830 N.E.2d at 172-73.

For all these reasons, if this court finds that the trial court should have applied the rule of forfeiture by wrongdoing to Julie Jensen's testimonial statements, it should direct the court on remand to use the preponderance standard in determining if Jensen forfeited his confrontation rights by killing Julie. The circuit court should make this preliminary determination before trial so that both sides can prepare for what will inevitably be a lengthy proceeding, knowing beforehand whether Julie's letter and her other statements[17] to Officer Kosman will be admitted. To safeguard the presumption of innocence, the jury should not learn of any forfeiture finding. Rather, the challenged evidence should simply be admitted over Jensen's objection, so the jury will draw no inference about the ultimate issue of guilt from the ruling itself.

Finally, at the hearing to determine forfeiture, the trial court will be bound by the rules of evidence only with respect to privileges. *See* Wis. Stat. §§ 901.04(1) and 911.01(4)(a). And, consistent with *State v. Whitaker*, 167 Wis. 2d 247, 258-62, 481 N.W.2d 649 (Ct. App. 1992),

[17]Under forfeiture by wrongdoing, not only the letter and voicemail, but also Julie's statements that the prosecutor conceded were testimonial, would be admissible against Jensen.

the trial court should be able to consider Julie's letter and oral statements as part of the evidentiary foundation for deciding whether Jensen forfeited his confrontation right by killing Julie.

CONCLUSION

This court should reverse that portion of the circuit court's order excluding from evidence the letter and voicemail message of Julie Jensen and remand to the circuit court for further proceedings.

Dated this 28th day of September, 2005.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,995 words.

Marguerite M. Moeller
MARGUERITE M. MOELLER

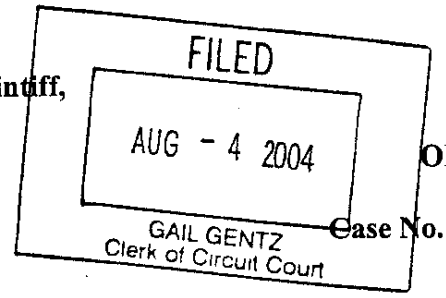
A P P E N D I X

INDEX TO APPENDIX

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,



-vs- **ORDER**

Case No. 02 CF 000314

MARK D. JENSEN,

Defendant.

The parties have submitted competing requests for orders arising out of the rulings made at the hearing of June 7, 2004. Rather than attempting to select between two alternatives of what the parties say that I said, I will elect, instead, to state that the order is made for the reasons stated in the record on that date, as amplified by this written order.

I again reiterate that preliminary rulings on evidence are based upon the court's best view of the case at this time, and are subject to change without notice.

Statements to the Wojts and Ms. DeFazio

The governing principle which determines the issue raised by these statements is that:

> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement. *Crawford v. Washington*, 541 U.S.---, Slip Op. at 15 (decided March 8, 2004).

The Sixth Amendment's aim is at "testimonial statements," a term which the Court declined to fully define, offering instead a lengthy historical analysis, which suggests that the

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term may be limited to statements made to governmental authorities in support of the detection of crime and the apprehension of criminals. *Id.* at 33.

Mrs. Jensen's statements to the Wojts and Ms. Defazio, could be viewed as remarks which were intended for the ears of the police, when viewed in conjunction with the conversations which she had with Officer Kosman. The defendant argues this, contending that she could reasonably have expected the statements to be repeated to the police, thus placing her listeners in the position of conduits for the police, and transforming otherwise casual remarks to acquaintances into testimonial statements. This conclusion is rejected by this court, first, because the Supreme Court did not adopt in *Crawford* the argument that "testimonial statements" include any "statements that were made in circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" *Id.* at 16; and second, because it would require this court to abandon neutrality, and to embrace, in ruling on what the jury should have available to decide the case, the theme offered by the defendant that Mrs. Jensen's motivations were suicidal and malicious. Certainly Mrs. Jensen's comments to others could, in fact, have been motivated by these purposes, but they could also have been driven by many other considerations, including the sentiments which the state contends she held. While her remarks could have been part of a complex design to ensnare the defendant in a charge of uxorcide following her own intended suicide, they would also be wholly consistent with "a casual remark made to an acquaintance" by a person alarmed by an anticipated, and terrifying danger. The information available to the court does not permit exclusion of these statements upon an assumption of ignoble motives by Mrs. Jensen.

Statements to Officer Kosman and the Letter

The right of confrontation protects not only against statements made during governmentally-initiated investigations, but also against statements made pursuant to the malicious use by individuals of the prosecutorial power of the government. In *Crawford*, the court noted that to the Framers of the Bill of Rights, "the likes of the dread Lord Jeffreys were not too distant a memory." *Id.* at 32. Ironically, Lord Jeffreys was the sentencing judge in the perjury case of Titus Oates, who, with his confederate Israel Tonge, drew up the perjured "True Narrative of the Horrid Plot," and whose agent delivered it to Charles II, thereby igniting the infamous reaction to his so-called "Popish Plot," which led to the banishment of thirty thousand Catholics from London, and the gruesome execution of thirty innocent people. Although the political and religious atmosphere was tense at the time, there was no ongoing governmental investigation of any specific "plot" to re-establish Catholicism in England, much less of any effort to assassinate the King and place his Catholic brother on the throne. By presenting their contrived deposition to the King, Oates and his accomplices enlisted the aid of the government to ensnare those supposedly involved in the fabricated plot. Prior to the Supreme Court's decision in *Crawford*, a document similar to the Narrative itself could conceivably have found its way into evidence without cross-examination. The state's suggestion that an unexpected and unsolicited letter, describing past acts attributed to another in alleged pursuit of a criminal objective, and which is not the product of a police interrogation, does not constitute a "testimonial statement," must be judged from the standpoint of the Oates "Narrative." Under the state's argument, the court would be allowed to determine that the document was not responsive to police investigation, and thus not "testimonial," and therefore permit its uncross-examined receipt into evidence. Even the "Popish Plot" authorities did not go that far. Whether, as in that

case, the punitive and oppressive power of the government is enlisted through accusations submitted, in the then-common form of a deposition; or in the modern form of a letter, as was the case in *Illinois v. Gates*, 462 U.S. 213 (1983) (anonymous letter), the Confrontation Clause "requires not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, Slip Op. at 26.

The Supreme Court's distinction between a "casual remark to an acquaintance" and "a formal statement to government officers" suggests that an appropriate determinant as to whether a statement is "testimonial" is the intended purpose of the statement. The Court distinguished the two types of statement in the context of how each "bears testimony." Id. at 15. Unlike the statements to her friends and neighbors, Mrs. Jensen's letter, and her statements to Officer Kosman, had no apparent purpose other than to "bear testimony." They were apparently intended exclusively for accusatory and prosecutorial purposes. The letter was to be opened only in the event of her death, and then was to serve as an accusation against her suspected killer. Even to the extent that it denies a suicidal intent, that is an integral part of the accusation. Indeed, it even refers to her husband as a "suspect."

Mrs. Jensen's oral statements to Office Kosman were obviously not made in an effort to escape from her situation, or to seek rescue from a feared danger. As explained in the oral ruling, they are, like the letter, testimonial statements.

Waiver/Forfeiture

The state suggests that the defendant has waived or forfeited his right to object to the receipt of Mrs. Jensen's testimonial statements because he killed her for the purpose of "getting her out of the way so that she wouldn't be litigating any issues about visitation or child custody,

about disposition of the marital estate; she would simply be put out of the way." Transcript, June 7, 2004, p. 10, l. 23 to p. 11, l. 3.

As was stated at the hearing, the defect in the state's waiver/forfeiture position arises from analysis of the historic co-existence of the three rules of antiquity at play in this case: the Confrontation Clause, the Dying Declaration Rule, and the Waiver/Forfeiture Rule. The Confrontation Clause, of course, is the constitutional command, and dates, in that status, from the First Congress in 1789. The rule excepting dying declarations from the confrontation requirements demanded by the Clause, which the Court refers to as "[T]he one deviation we have found" to the requirement of cross-examination, *Crawford* at 20, fn. 6., is an ancient one, dating at least to *King v. Reason*, 16 How. St. Tr. 1, 24-38 (K.B. 1722). The Court also indicated its acceptance of the rule of forfeiture by wrongdoing, *Crawford*, Slip Op. at 26, citing *Reynolds v. United States*, 98 U.S. 145, 158-159 (1879). *Reynolds*, in turn, cited *Lord Morley's Case*, 6 State Trials, 770 (H.L. 1666) in support of the rule. Thus, it is clear that both the Dying Declaration Rule and the Forfeiture Rule existed at the time of the adoption of the Sixth Amendment's Confrontation Clause.

The criteria suggested by the state for invocation of the Forfeiture Rule cannot be reconciled with this history. If an accused forfeits or waives the right of cross-examination merely by killing the victim to "put her out of the way," then there would have been no reason for the development of the Dying Declaration Rule, which contains the added requirement that the declarant's statement have been made "while believing that the declarant's death was imminent." The existence of the Dying Declaration Rule makes sense only in an evidentiary framework in which the mere fact that the defendant can be convincingly shown to the judge to have killed the declarant does not, by itself, justify exception to the requirements of the

Confrontation Clause. Indeed, expansion of the forfeiture rule to the extent suggested by the state sounds suspiciously like the type of judicial "reliability" findings denounced by the Court in *Crawford*, Slip Op. at 32.

Statements of this court at the time of the hearing on these issues are specifically incorporated herein.

Again, as has been stated repeatedly, portions of statements, divorced from the whole, may be acceptable for legitimate purposes. But wholesale receipt of the letter, for example, is constitutionally impermissible.

It is so ordered.

Kenosha, Wisconsin, Wednesday, August 04, 2004.

BY THE COURT:

Bruce E. Schroeder
Circuit Judge

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

MOTION HEARING

Case No. 02-FE-814

MARK D. JENSEN,

Defendant.

FILED

JUN - 8 2004

GAIL GENTZ
CLERK OF CIRCUIT COURT

BEFORE THE HONORABLE BRUCE E. SCHROEDER

Circuit Court Judge Presiding

APPEARANCES: ROBERT JAMBOIS, District Attorney, and Susan Karaskiewicz, Deputy District Attorney, appeared on behalf of the State of Wisconsin.

CRAIG ALBEE, Attorney at Law, appeared on behalf of the defendant via telephone. The defendant was present in Attorney Albee's office and on speaker phone.

Date of Proceedings:
June 7, 2004

Pamela S. Delany
Court Reporter

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110

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BY THE COURT: All right. Hello.

BY MR. ALBEE: Hello?

BY THE COURT: Yes.

BY MR. ALBEE: Good morning, Judge.

BY THE COURT: Good morning. How are you today? Is this Mr. Albee?

BY MR. ALBEE: It is. I have Mr. Jensen in the office as well, and I will try to put him on speaker phone so when somebody other than me is talking he can hear.

BY THE COURT: Very good. And this is the continuation of the case of the State against Mark Jensen, and the district attorney, Mr. Jambois, is here along with Deputy District Attorney Susan Karaskiewicz.

And I had indicated that I was going to decide the issue respecting application of Crawford v. Washington to previously-made evidentiary tentative rulings that I had made earlier in the case. And I'll start with the statements attributed to Ms. Jensen from--to Mr. Wojt and Ms. DeFazio.

The Crawford case states, at page 1364, that an accuser who makes a formal statement to a government--to government officers bears testimony in a sense that a person who makes casual remarks to an acquaintance does

not-- It could be that given the conversations that Ms. Jensen is reported to have had with Officer Kosman, that she reasonably expected the statements made to others to be relayed to the police. But that would be a supposition that I don't think the circumstances of the case fully justify. It would also have been consistent with the standard complaint that a person in the situation in which she's reported to have perceived herself would feel. I mean there's nothing inconsistent with a person making general observations about her lot in life or this situation in which she was living to a close friend or neighbor or sympathetic acquaintance and also making accusatory statements to the police. And merely because accusatory statements are made to the police does not mean that everything that is said by the declarant becomes an accusatory statement such that it would constitute a testimonial utterance. That would be way too broad of a rule, and I don't think anything in Crawford or any other law that has been cited to me would suggest that--that the word "testimonial" would have such a broad sweep that it would capture everything that the declarant ever stated on the subject.

There is nothing--and I don't want to say there's nothing--but there's almost nothing in the statements attributed to Mrs. Jensen in her conversations with the

others that link her concerns to her complaints to the police. And even to the extent that there is, that hints--it is a long distance from showing that her statements were intended to be relayed to the police for their use in prosecuting the defendant. And, in fact, if it were as certain as the defendant contends, that the statements were made to Mrs. DeFazio and the Wojts for the purpose of being relayed to the police department, there would have been little need for the statements which were made directly to Officer Kosman or for the preparation of the letter.

And the contrary is also true. It is not in the least bit surprising to this Court that under the bizarre circumstances reported to have existed by Ms. Jensen, that she would have made contemporaneous accusatory statements to the police and statements to friends for nonaccusatory purposes. Only testimonial statements are excluded under the confrontation clause, so I see no reason to alter any of the decisions I have made with respect to the conversations with Ms. DeFazio and Mr. and Mrs. Wojt.

The statements made to Officer Kosman, both in the form of the letter and in the form of the personal conversation and in the form of the telephone call, are not the same. And I think one of the things that needs to be remembered is that the right of confrontation is a

protection, not just against governmental or police authorities, but also against condemnation of an individual by a poison-penned letter. If somebody were to write a letter saying I followed Bruce Schroeder home from work every day, and he always stops and steals a newspaper from the newsstand and sends that to the police, that is as damaging as if the police contacts the person and asks if Schroeder has been stealing newspapers.

The purpose of the accusation--the purpose for which the utterance is made, I guess, is the best way to put it--is what dictates whether it's a testimonial statement or not. And so I definitely think that the circumstances in this case suggest that the letter was intended exclusively for accusatory and prosecutorial purposes. I can't imagine any other purpose in sending a letter to the police that is to be opened only in the event of her death other than to make an accusatory statement given the contents of this particular letter. And even to the extent that it denies a suicidal intent, it is an integral part of the accusation to further show that it's an accusatory statement, and it even uses the word "suspect" in reference to the defendant.

I think this differs substantially from similar statements which might have been made in a diary because it was explicitly offered to--it was put onto a conduit to go

to the legal authorities in the event of her death for the purpose of the condemnation of the accused, and so it--in its entirety, in the Court's estimation, it is a testimonial statement.

The same is also true of the statements which were made to Officer Kosman, and that is particularly underscored by the fact that she stated she did not want any action taken at that time; that, rather than rendering the statement nonaccusatory, it makes it more accusatory in my estimation in the sense that-- Well, I guess I don't want to say that. But it doesn't take it out of the category of being nonaccusatory, but it heightens the impression that the statements were made for no other purpose than for prosecution because she didn't even want immediate action taken. It was not a call for help. It was not a person seeking rescue from existing circumstances. It was rather a statement designed to ensnare the defendant in a criminal charge in the event that she died, so it becomes an accusatory statement and testimonial in nature.

And the first call to Officer Kosman in which the voice mail is left, I don't see it as equivalent to a 911 call, which I think the district attorney has correctly argued would be an exception in most instances, or at least part of the call would be an exception in most instances,

because the 911 call is a call made in an emergency for relief from a sensed harm and/or danger--a perceived danger, I should say.

And in this case the declarant did not, when she was greeted with voice mail, didn't ask for an alternative where she could have gotten urgent assistance, but instead she left, for an unspecified length of time, a voice mail asking that the officer call her in the future, and when she did get in the conversation, said "give me a call." Again, it's--it is not in any way equivalent to an emergency 911 call and must be taken as a testimonial statement. So all of the statements to Officer Kosman would be--including her letter--would be viewed as testimonial utterances.

The question about offering the evidence to prove matters not asserted; for example, the absence of a suicidal intent, the problem is that included in the statements are statements either explicitly stating or suggesting that she's not suicidal, so it is being offered to prove the truth of the matter asserted, so it doesn't escape application of the confrontation clause that way.

I would have to go through separately under the circumstances existing at the time of any offer that was made to determine for any isolated statements as to whether or not it would be admissible as not being offered to prove

the truth of the matter asserted. But as a general statement, I think that more than I ruled last time where I was accused of parsing the statements, I feel even--I think that was an appropriate approach then under Crawford v. Washington. I think it is less appropriate to parse statements and to try to pull something out, but I do think that there may be individualized--individual, isolated statements that would be admissible, if offered not to prove the matter asserted, but to prove something else.

With respect to the issue of waiver, that is a most perplexing issue. The United States against White case, which was cited--it's one which there were existing charges, and then the declarant allegedly was ultimately murdered by several of the defendants while the action was pending. And there's two things that I think--and I do want to hear some more argument on this because I don't know the answer. There are two things that trouble me about comparing the White case with this one, and one of them is that in White there were existing criminal charges against the defendants, and then for the purpose of preventing the witness from testifying, the declarant was murdered with knowledge that--with knowledge by the defendants that the declarant was a potential witness against them. And the other is that there was a preexisting charge, and that there--it would not make any

sense at all to separately prosecute those accused of the murder and also of the preexisting drug charges, where in the trial of the preexisting drug charges it would be necessary to prove the murder anyway to prove the unavailability of the declarant, so it would make sense to join the cases.

This is a different situation where there's no preexisting charges, and that is in my estimation an enormous difference, and it hasn't--the statement was made the other day, and I think it's borne out by what I've seen; that there's no reported case in which an individualized charge of--how do I want to say it?--where--well, certainly not a murder case, where there's a declarant's out-of-court statement--testimonial statement--was excluded which would otherwise have been excluded--has been admitted in the murder prosecution on the basis of waiver or forfeiture by committing the murder. So I've expressed my concerns, and did you want to be heard?

BY MR. JAMBOIS: Well, you're correct, Your Honor, in the sense there's no reported case like that. There wasn't any reported case like Crawford v. Washington until the U.S. Supreme Court ruled on it, and the manner--the direction in which they were proceeding was the direction that had been proposed by Professor Freidman, and

Professor Freidman has made this same proposal with respect to the issue of waiver or forfeiture. He has suggested that if the Court adopts the principles which they did adopt in Crawford v. Washington, then there should be a coextensive expansion of the doctrine of waiver. He was proposing that within the context of child sexual assault cases admitting the child's statements that otherwise would be inadmissible on confrontation clause grounds, the same analysis, the same justification would apply in murder cases where the victim is unavailable to testify because the defendant murdered her. And that's clearly--that's the State's theory of the case here is that the reason that Julie Jensen is not available to testify about the contents of her note, about things that were set forth in her note, about the things that were taking place in this relationship is because the defendant got rid of her.

BY THE COURT: Well, the defendant makes a point in his brief of noting that there's no evidence that Mr. Jensen even knew about Ms. Jensen's statements and therefore could not have been acting with intent to silence her.

BY MR. JAMBOIS: Correct. That's true, Your Honor. But what--not so much with intent to silence her with respect to that particular issue, but simply with respect to getting her out of the way so that she wouldn't

be litigating any issues about visitation or child custody, about disposition of the marital estate; she would simply be put out of the way. This is not--this is not a crime of passion, Your Honor. This was a very carefully planned, carried out murder.

BY THE COURT: Well, why have any rule against that? Why even have a dying declaration rule then which requires--which has other requirements than just that the decedent has died, but also requires that there be a knowledge of impending death and so on and so forth. If what you say to be the truth about waiver and forfeiture, wouldn't dying declarations just come in like that?

BY MR. JAMBOIS: Well, in terms of looking at the etiology of where the dying declaration exception arose, it was really kind of a subcategory of the excited utterances doctrine is the way I view dying declarations so that--

BY THE COURT: I don't think that's what Professor Freidman says.

BY MR. JAMBOIS: Well, Professor Freidman doesn't think very much of dying declarations actually. And there--a dying declaration is typically made when the person is right on the moment of death, and there's also sort of a religious aspect to dying declarations because the theory underlying is that people don't wish to meet

their maker with a lie on their lips, and these are more secular times than the time when the dying declaration concept--

BY THE COURT: I'm not trying to defend the dying declaration rule. I'm just saying if Crawford v. Washington--which, by the way, the Supreme Court went to great lengths to say is not new law, but is merely a restatement of existing law--hundreds of years of existing law, and Justice Scalia, its author, makes a very, very forceful presentation across the country about his being an originalist in trying to read the Constitution as a contract as it was originally designed-- If it is just the restatement of existing law, why would there be a dying declaration rule because any statement by the accused or by the decedent--made by the decedent about the circumstances of his death by his murderer would be admissible under your forfeiture and waiver rule, would it not? Then we have the special additional requirements of the dying declaration, that the death results from the injury from which the decedent is suffering at the time of the statement.

BY MR. JAMBOIS: Well, I don't know, Your Honor. And it could very well have been that the case law for which that dying declaration was first being admitted was some sort of a recognition that the defendant--that the defendant should not profit by his own wrongdoing. He

should not be permitted to raise a confrontation clause issue or hearsay argument when he is the reason that the declarant is not available to speak. Who knows? They may have put it as a dying declaration, but the facts--addressing the particular facts that are before them and just as--

BY THE COURT: I think I'm not making myself clear. If I understand your argument properly, whether or not the accused knew of the statements attributed to Ms. Jensen and the accusations she was making against him, this evidence can be received as waiver or forfeiture, but the rule stated in Crawford vs. Washington is an ancient one. The rules of forfeiture and waiver are ancient ones, and the rules of dying declarations are ancient ones, and the dying declaration requires more than the forfeiture waiver arguments that you're presenting. Where am I going wrong?

BY MR. JAMBOIS: Your Honor, I recognize I am proposing an expansion--an extension of the forfeiture doctrine beyond what it has been before, but I'm not proposing it beyond what others have proposed such as--and people perhaps more persuasive than me and more authoritative on the subject such as Professor Freidman has suggested; that the forfeiture doctrine or the waiver doctrine should be expanded beyond its existing standard, and that's what I'm proposing that this Court should

consider doing.

And I recognize that Justice Scalia might not consider Crawford v. Washington to be new law, but it is a new interpretation of what the law is, and it has profound implications such as, for example, in this case before Crawford v. Washington, Julie Jensen's letter was coming into evidence, and now it's not. So regardless of Justice Scalia's perception, it seems to me it's new law, and it's having this untoward effect in this particular prosecution.

It just seems to me, Your Honor, that there--that the basic principle that Professor Freidman is making comes down to chutzpah and applies here. The defendant gets rid of the witness and then complains that she's not available to cross-examine on these predeath statements. So that base concept of chutzpah applies, and it wouldn't necessarily be applicable in every case, but this was a calculated, thought-out, carefully-planned murder. This defendant was very--this was not a heat of passion thing.

BY THE COURT: Well, you see, I don't have the luxury in making my evidentiary rulings on the supposition that the defendant committed the crime.

BY MR. JAMBOIS: That is correct, Your Honor. And typically what happens before--and I'm not suggesting you should simply make that decision without a hearing. I've indicated that there would be a need for a

hearing, a pretty extensive hearing, to determine whether or not--whether or not you would--the State can prove either by preponderance of the evidence, which is presently the standard in the State of Wisconsin, or to a higher standard, that the defendant most likely caused the victim's death. And if the State can prove that the defendant is most likely responsible for the victim's nonappearance or the declarant's nonappearance, then the State should be permitted to offer her predeath statements.

BY THE COURT: Thank you. Mr. Albee?

BY MR. ALBEE: Judge, it has been noted there are no other cases expanding the forfeiture waiver principle in this fashion. Crawford certainly doesn't expand the principle of waiver in making its decision. The justices who decided Crawford, including the author, Justice Scalia, clearly recognized that in certain cases this would have the result of excluding evidence, and they have to adopt exceptions that would be inconsistent with the Sixth Amendment simply because there would be evidence lost in a particular case.

Crawford, I think, asserts that the status quo should remain with respect to the waiver forfeiture, and that status quo is that precondition. The Court indicated before that there has to be an existing case, and it has to be for the purpose of eliminating a witness so that the

witness can't testify in the existing case. Those preconditions remain.

Mr. Jambois relies again quite a bit on Professor Freidman, but he has not been elevated to the Court, and the fact that his views have been adopted by the Court with respect to one issue, it is the scope of the Sixth Amendment, where the declarant is unavailable and the statement is testimonial is by no means a stamp of approval for all his views on a whole wide range of topics. And the Court has not weighed in in Professor Freidman's position on the waiver forfeiture principle.

As the Court points out, even the dying declaration exception, which I don't think has any--it doesn't have any application here, and I--you know, I think it's sort of purely an intellectual discussion to hash that out, but at any rate, it's a very narrow principle, and I think in recognition--simply because a witness is dead does not mean that anything that person said should be admitted. It is--it's--to borrow the phrase by the Court--in the nature of a "poison pen" situation.

In addition, the fact that wherever--the point I've already made, that whenever waiver or forfeiture has been used in the past, it's been subject to those preconditions. I think also to expand it in this way would merely violate the Sixth Amendment. It also, you know, simply is a matter

of policy. It is bad policy in terms of how we run our courts. It would be a very cumbersome hearing. I think it puts a judge in an incredibly awkward position, one that a court shouldn't have to be in, of deciding what the issue--deciding the issue that's ultimately going to be before the jury. And anyway, there's no precedent for such a decision from this Court which should limit forfeiture and waiver to the limitation imposed by every court that has considered the issue in the past and they would not approve it. Under those principles, it would not apply here.

BY THE COURT: Thank you. Did you wish to respond, Mr. Jambois?

BY MR. JAMBOIS: I don't consider it to be an unworkable or an unwieldy proposal, Your Honor, and, in fact, I recognize that Professor Freidman has not been appointed to the Supreme Court, but I tell you what; his reasons were in some portion of the decision almost verbatim adopted by the Supreme Court. And what Professor Freidman had written about this concept of a pretrial hearing is-- He said at first glance this application of the forfeiture principle might seem to be a bizarre instance of bootstrapping, but it is not. For purposes of citing the forfeiture principle applied, the judge would determine whether the accused had committed misconduct

rendering the witness unable to testify, and the result would either be admission or exclusion of the evidence, and the jury would not be aware of what the judge's ruling was; they would just--they would hear the testimony, they would hear the evidence. If the judge ruled that it was admissible, they wouldn't hear the evidence. If the judge had excluded it, then either way the jury would not be aware of the Court's ruling on this--what would ultimately be the issue of whether or not the defendant murdered the victim, but the Court would also be making the decision on a far lesser burden of proof than that which would be confronted by the jury. The jury obviously is required to make a decision based upon beyond a reasonable doubt, whereas a pretrial hearing of this sort typically the Court operates on a preponderance of the evidence standard of proof or at most, the middle burden of proof, by clear and convincing evidence.

BY THE COURT: Thank you. Well, as I said before, the--although I agree with you that there's a change in the approach and a change in the law brought about by Crawford v. Washington in the sense that it overruled--

BY MR. JAMBOIS: Ohio v. Roberts.

BY THE COURT: Ohio v. Roberts, thank you. So to that extent, it's a change in the law. But one of

the most eminent jurists in the history of the United States has written a very, very thorough analysis of the history of the rule, and says that with the exception of Ohio v. Roberts, this is consistent with all other rulings over the centuries, and to the extent that it's a change, it was a very, very temporary change.

We have three rules in play here of antiquity. One of them is the confrontation rule, which is--which is Crawford v. Washington. One of them is the waiver forfeiture rule, and one of them is the dying declaration, which I agree with you, has its roots in medieval Christian belief, that one is not about to meet the Lord with a mortal sin of perjury, really, in essence, the testimonial statement condemning somebody else to death, on his lips. So the dying declaration exists.

But let's look at the dying declaration rule. It says the statement was made by the declarant while believing the declarant's death was imminent concerning the cause or circumstances of what the declarant believed to be the declarant's impending death. Looked at from the context of this case, and let's eliminate the words "while believing that the declarant's death was imminent;" that's what you're proposing. You're saying a statement made by a declarant concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

And from ancient times there was something more needed in order to escape the application of the confrontation clause, and that was that the declarant had to have been believing that death was imminent. So the apparent basis of the rule was just exactly what you state; the religious--it was a religious exception that would otherwise slam the door on the declarant's statement. And since this statement does not qualify--or it doesn't--

BY MR. JAMBOIS: I'm sorry, what?

BY THE COURT: --or doesn't as a dying declaration--

BY MR. JAMBOIS: Does her letter qualify as a dying declaration? I believe at the time, Your Honor, Julie Jensen wrote this letter, she did not expect to die.

BY THE COURT: Okay. Well, then I have to say the answer to the question is that waiver forfeiture, which I do agree with the defense, would be a cumbersome process, but, you know, hey, I get paid to do cumbersome stuff sometimes, so I don't have any problem with that. We have cases-- I mean I look at this case-- Why does it take so long to try cases in California?

BY MR. JAMBOIS: I don't know, Judge.

BY THE COURT: How long are they talking about this Peterson case lasting? Imagine having to try that twice. Or there's been other notorious ones. But the

cumbersome nature of the proceedings in and of itself would not cause me to rule against the State. But I do think, number one, that the distinction that I drew before about the fact that there's not an existing charge, and also not showing that there was a purpose in preventing the declarant's testimony; and, secondly, because I'm unable to justify the existence of the dying declaration rule, if the forfeiture and--or waiver rule was to be interpreted as the State has contended, for those reasons I rule that it is not--that rule is not applicable in this case and, therefore, the statements, both written and oral, made to Officer Kosman are inadmissible.

BY MR. JAMBOIS: Including the letter?

BY THE COURT: Including the letter--

BY MR. JAMBOIS: Okay.

BY THE COURT: --as part of the State's case in chief. I don't know. I'm not going to say anything more on the subject at this point.

Now, there were some other issues.

BY MR. JAMBOIS: Well, Your Honor, the--all the other issues kind of pale in comparison to this one.

BY THE COURT: I know it. I assume you're going to appeal.

BY MR. JAMBOIS: What I am going to do, Your Honor, is go back to my office and sit down and go through

this with Ms. Karaskiewicz. We're going to review the evidence. We're going to talk to the family of Julie Jensen. We're probably going to discuss this with the attorney general, and we expect to make a decision within a day or two with what to do next.

BY THE COURT: The only reason--

BY MR. JAMBOIS: An appeal is likely, I would say.

BY THE COURT: The only reason I asked if there is going to be an appeal, perhaps it is better that I rule on the other issues now. As I said in the first place, I don't want to have sequential appeals.

BY MR. JAMBOIS: Okay.

BY THE COURT: That's why I would like to dispose of everything we can if there's going to be an appeal.

BY MR. JAMBOIS: Here's the thing. In terms of the other acts issues, what I indicated to Mr. Albee is that it's difficult for me to know precisely at this juncture what other acts we're going to go into because obviously we're--if the ruling stands where this letter gets excluded in the State's case in chief, our case is going to be looking a whole lot differently than what we had expected it to look when we were talking about other acts evidence several months ago.

Quite frankly, we'll have to go back and revisit all of the evidence in this case, and I would say this; that it would be my expectation that we seek to--we will be seeking to admit all--anything that we can find in the computers that would be of assistance to us in proving this case.

And I just don't know. If you're looking for a specific representation from the State as to what other acts evidence we would be looking at, there are some photos in the computer we probably would be looking at to introduce into evidence that were on Mark Jensen's computers, both at home and at the office, that we would be seeking to introduce as other acts evidence, not necessarily bad acts evidence, not to show that he's a bad person, but to demonstrate certain things such as who had access to the computer and who was using the computer, and also to revisit this whole issue of leaving photos around the house in the years preceding Julie Jensen's death, because if this letter remains exluded, then the State's going to need to be looking at other ways of proving--of proving what kind of relationship Mark Jensen actually had with his wife, and so it may be revisiting that issue about those photos being left around the house and who actually was leaving them. So I don't know.

And there are psychological reports from the experts, and by the way, I point out, Your Honor, that the State's

forensic pathologist, the one that we would be using, Dr. Jensen, relied to some extent on the letter in making his determination as to the forensic toxocology.

BY THE COURT: I thought about it. I thought, oh, no.

BY MR. JAMBOIS: And our suicidologist and their psychiatric experts all were--

BY THE COURT: That's a different question altogether.

BY MR. JAMBOIS: So anyway, I recognize that's another question altogether, but, you see, Judge, I'll tell you this. In terms of an appeal, my view that the simplest issue on this appeal--I'm not saying it's an easy one--it's the simplest way to term it--is is this letter a testimonial statement or isn't it? And that's quite a distinct and separate issue from these--

I'll tell you this. Everything else we would be talking about, admission of other acts evidence, that's largely discretionary with the Court. This issue--this one question is really a question of constitutional fact. So I think the--I expect that we're going to have a de novo review on that particular issue, even though I recognize the Court is exercising its discretion, and clearly, you have done so according to the law as it exists, but the law as it exists on this issue is pretty slender, seeing how

the U.S. Supreme Court just rendered their decision in March of this year. So I think it's--that's the simplest issue to go up on in terms of the interlocutory appeal. I don't think we would necessarily be wanting to appeal anything else; but, of course, maybe defense counsel thinks they would, but they don't have a right to an interlocutory appeal. They always get another kick at the cat after the trial is over. The State doesn't.

BY MR. ALBEE: Judge, in terms of the admissibility of other acts evidence, I suspect that would not be something that we would appeal now, especially given the uncertainty of the State's intentions to even use it or the scope of what they're using. My main concern as I listen to Mr. Jambois now is the consideration of using the photos around the house, which over a year ago I thought that that was a concluded issue and that that wouldn't be coming in, and certainly, we haven't done that kind of investigation on that issue that we might have.

As I understand the issue now, the State is saying that it's likely to appeal the Crawford issue. And if that's the case, I don't know that there are any other orders that we need the Court to enter. I think the only pending motion before the Court is as it does relate to the other acts evidence. And if the State is appealing here, I don't think we need to address that since how the State

approaches that issue also is likely to change depending on what happens on appeal. So that would be our position. I think--I think that's purely a trial issue, and if the trial is going to be later, I think we're going to be potentially under different circumstances, and the Court's ruling should come as the circumstances exist at that time.

BY THE COURT: Well, the only thing--my only request would be if you appeal, would you ask them--in the event that what I've ruled is sustained, if you would ask them what to do about the suicidologists who have relied on the letter?

BY MR. JAMBOIS: Well, you see, Judge, you haven't ruled on that.

BY THE COURT: I know I haven't. I know I haven't. I don't even want to get into that. I thought about it, and I thought, oh, no. Let's take one hurdle at a time. And I just think, well, maybe, you know, they can save everybody some trouble in the event that they affirm what I've already said; maybe they can tackle that one, too.

BY MR. JAMBOIS: Okay. I'll have to talk with the A.G. Quite frankly, I don't see how they can address that issue since you haven't ruled. Maybe they will. Maybe they will. We'll maybe throw in a paragraph about that issue as well if we appeal. Like I said, I'll

need to consult with the A.G. and Ms. Karaskiewicz and the victim's family on this issue.

BY THE COURT: I understand. Okay. Anything else that needs to be done today?

BY MR. JAMBOIS: No, Your Honor. We would expect to be able to notify the Court by the end of the week as to what we're going to be doing.

BY THE COURT: By Friday?

BY MR. JAMBOIS: By Friday.

BY THE COURT: Okay.

BY MR. JAMBOIS: If not sooner.

BY THE COURT: Do we need to do anything else at this point then?

BY MR. JAMBOIS: No, Your Honor.

BY THE COURT: In the event that you don't appeal, do we need another chat before we have the trial?

BY MR. JAMBOIS: Well, then we're going to be talking about other acts evidence.

BY THE COURT: Then we'd better set a date for next week sometime in case there is no appeal.

BY THE CLERK: Any day other than, I think, Wednesday, but it's the district attorney conference, so I don't know.

BY MR. JAMBOIS: I'm going to be here. How about Thursday of next week?

BY THE COURT: June 17th? At what hour would be convenient for you folks?

BY MR. JAMBOIS: I'm clear the whole day, Your Honor, whichever time. How about first thing in the morning?

BY MR. ALBEE: That's Thursday?

BY THE COURT: Nine o'clock?

BY MR. ALBEE: Could you hold on for just a second?

BY THE COURT: Sure, sure.

BY MR. ALBEE: I'm sorry. Hello?

BY THE COURT: Yeah.

BY MR. ALBEE: I am available in the morning.

BY THE COURT: At 9:00 a.m.?

BY MR. ALBEE: Yeah, that would be fine.

BY THE COURT: All right. That will be the date then, and that will be subject--of course that will be removed if there's an appeal. Anything else?

BY MR. JAMBOIS: No, Your Honor. Thank you.

BY THE COURT: Thank you, and have a good day.

BY MR. ALBEE: Thanks, Judge.

(Whereupon, proceedings concluded.)

STATE OF WISCONSIN)
) SS.
COUNTY OF KENOSHA)

I, Pamela S. Delany, Official Court Reporter, in and for the County of Kenosha, Kenosha, Wisconsin, do hereby certify that the foregoing 29 pages of proceedings have been carefully compared by me with my original stenographic notes taken upon said hearing and that the same is a true and correct transcript of the hearing had in the matter of State v. Jensen, taken on the 7th day of June, 2004.

Dated this 8th day of June, 2004.

Pamela S. Delany
Official Court Reporter

Pleasant Prairie Police Department,
Ron Kosman or Detective Ratzenburg-

(110) I took this picture + (111) am writing this on Saturday 11-21-98 at 7AM. This "list" was in my husband's business daily planner - not meant for me to see. I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work + the Kids; he's an avid surfer of the Internet...

Anyway - I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more with him in the evenings. I don't. I would never take my life because of my Kids - they are ~~everything~~ to me! I regularly take Tylenol + multi-vitamins; occassionally take OTC stuff for colds, Zantac, or Immodium; have one perscripton for migraine tablets, which Mark use more than I.

I pray I'm wrong + nothing happens... but I am suspicions of Mark's suspicious behaviors + fear for my early demise. However, I will not leave David + Douglas. My life's greatest love, accomplishment and wish: "My 3 D's" - Daddy (Mark), David +, Douglas.

Julie C. Jensen

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 04-2481-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

MARK D. JENSEN,

Defendant-Respondent-Cross-Appellant.

ON BYPASS OF THE COURT OF APPEALS TO REVIEW A PRETRIAL ORDER SUPPRESSING EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Cites

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Jensen agrees with the state that oral argument and publication are appropriate given that this Court found this case important enough to merit review.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 04-2481-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

MARK D. JENSEN,

Defendant-Respondent-Cross-Appellant.

BRIEF OF RESPONDENT

STATEMENT OF FACTS

On December 3, 1998, Mark Jensen found his wife Julie dead in their bed (R1).[1] The initial autopsy report was inconclusive (R1:3), but ultimately the Kenosha County Medical Examiner, Dr. Maureen Lavin, concluded that Mrs. Jensen died from

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[1] Throughout this brief, references to the record will take the following form: R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the appendix, it will be further identified by appendix page number as App. __.

ethylene glycol poisoning (R1:3,5). Dr. Lavin also concluded that the death was a homicide, relying in part on the report of Dr. Christopher Long, a toxicologist with the St. Louis University Laboratory (R1:3,5).

Over three years later, on March 21, 2002, the state charged Mr. Jensen with first-degree intentional homicide (R1). At the preliminary hearing, the state presented testimony from police officers Ron Kosman and Paul Ratzburg, the Jensens' neighbor, Tadeusz Wojt, and Dr. Lavin (R100, 101).

Kosman testified concerning statements Mrs. Jensen made to him personally, and in a voicemail in the weeks just prior to her death. Kosman indicated that he received two voicemails from Julie Jensen about two weeks before her death while he was vacationing (R101:41-43). In the second voicemail, Mrs. Jensen said that she thought she was having a little problem as Mark was trying to kill her and she asked Kosman to call her back (R101:43). Kosman called Julie and then went to her home. Mrs. Jensen told Kosman about strange writings on a day calendar and also indicated that Mark had been looking up some material on the internet which she thought was a little bit strange (R101:44). She said that she had photographed portions of the day planner and given the film to her neighbor along with a letter. Mrs. Jensen then retrieved the film (but not the letter) and turned it over to Kosman, telling him that if she were found dead, she did not commit suicide and that Mark would be her first suspect (R101:44-45). Kosman advised Mrs. Jensen to leave if she felt threatened,

but she declined (R101:45). Detective Ratzburg testified that the day after Mrs. Jensen's death he received a sealed envelope from Mr. Wojt containing Mrs. Jensen's letter to Kosman and Ratzburg (R100:66-67, Ex. 9; A-Ap. 136).

Mr. Wojt testified concerning statements that Mrs. Jensen made to him in the weeks prior to her death (R101:6-39). According to Wojt, during the 3 ½ weeks prior to Mrs. Jensen's death, she was upset, miserable, and scared (R101:8-12). She expressed fear that her husband was trying to poison her or inject her with something because he was trying to get her to drink wine and she found syringes in a drawer (R101:10-12). Two and a half weeks before she died, Mrs. Jensen told Wojt that she did not think she would make it through the weekend (R101:10). She also claimed she found suspicious notes written by her husband and computer pages about poisoning (R101:10).

Dr. Lavin testified that Mrs. Jensen's death was a homicide, relying on Dr. Long's report. According to Dr. Long, Mrs. Jensen's death was a homicide because her stomach contained a large amount of ethylene glycol at the time of her death (R1:3; R100:14). Dr. Long's report reflected that Julie Jensen's stomach contained 660 mL of green liquid at the time of death that was largely comprised of ethylene glycol (R1:3; R100:14). For her stomach to contain such a large quantity of ethylene glycol, she would have had to have ingested it shortly before her death (within a few minutes) (R1:3; R100:19). Since ethylene glycol only becomes fatal after it

metabolizes, and oxalate crystals in Mrs. Jensen's kidneys demonstrated that ethylene glycol was consumed at least 12 hours earlier, Long and Lavin concluded that Mrs. Jensen had had at least two doses of ethylene glycol and that she would have been too ill from the first dose of ethylene glycol to have consumed the large second dose on her own (R1:3; R100:15-20, 48, 57-60, 66-67, 70, 73-74).[2]

The state also has asserted that someone in the Jensen home used the computer during the weeks prior to Julie Jensen's death to view websites relating to ethylene glycol and other poisons (R1:4), but the computer usage in itself does not identify the user.

Following the preliminary hearing, Jensen was bound over for trial. Among the pretrial motions Jensen filed were motions challenging the admissibility of Mrs. Jensen's statements to Kosman, Mr. and Mrs. Wojt, and Theresa DeFazio, a teacher for one of the Jensens' sons. These motions were extensively briefed and argued before Judge Schroeder (R30, 34, 46, 63, 68, 73, 77, 81, 82, 107, 108).

Jensen asserted that the admission of Julie Jensen's statements would violate the rule against hearsay and the right to confrontation under the state and federal

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[2] Dr. Long's conclusion that Mrs. Jensen's stomach contained approximately two-thirds of a liter of liquid, largely comprised of ethylene glycol, is wrong. As reflected in the report of Dr. Scott Denton, a Deputy Medical Examiner with the Cook County Medical Examiner's Office, Mrs. Jensen's stomach contents actually contained only about 2.4 grams of ethylene glycol at the time of her death (R92:38)(p.3 of Denton's report). Thus, the premise for Long's (and Lavin's) opinions, that Mrs. Jensen's stomach contained a large quantity of ethylene glycol that she could not have ingested herself, is not supported by the evidence. *Id.*

constitutions, under the then governing test of *Ohio v. Roberts*, 448 U.S. 56 (1980).[3] Judge Schroeder evaluated each statement of Julie Jensen independently to determine its admissibility under the hearsay rules and *Roberts* (R107, 108). The court used the statement of facts presented in the state's memorandum in support of admitting Mrs. Jensen's statements as essentially an offer of proof regarding the particular statements of Mrs. Jensen the state intended to introduce at trial (R107:19-21; R30). The court then ruled on these statements individually, finding most, but not all of them, admissible (R107, 108). The court found Julie Jensen's statements to Kosman in person and in the letter admissible in their entirety (R108:16-29, 152-54). The state conceded that the voicemails were inadmissible hearsay (R107:93).

Following these rulings, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). In light of *Crawford*, Judge Schroeder reconsidered his previous confrontation rulings. Judge Schroeder determined that all of Julie Jensen's statements to officer Kosman were testimonial and therefore inadmissible under *Crawford* (R97:3-4; A-Ap. 103-104; R110:4-8; A-Ap. 110-114). Judge Schroeder determined that Mrs. Jensen's statements to the Wojts and DeFazio were not testimonial and therefore his prior rulings on the admissibility of the statements remained in effect (R97:1-2; A-Ap. 1-2; R110:2-4; A-Ap. 108-110).

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[3] While this brief and the cross-appeal brief discuss the confrontation issues in terms of the Sixth Amendment, Jensen asserts that these statements are inadmissible under the state constitution as well.

Additional facts are presented in the Argument section.

ARGUMENT

I. The Circuit Court Correctly Held that Julie Jensen's Voicemail Message and Letter to Police are Testimonial Under *Crawford* and Therefore Inadmissible.[4]

A. Standard of Review.

Whether the admission of evidence violates the defendant's right to confrontation is a question of law subject to independent appellate review. *State v. Hale*, 2005 WI 7, ¶41, 277 Wis. 2d 593, 691 N.W.2d 637. For purposes of that review, the appellate court must accept the circuit court's findings of fact unless they are clearly erroneous. *State v. Jackson*, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998).

B. Julie Jensen's Statements, Letter, and Voicemail to Police are Testimonial Under *Crawford* and Therefore Inadmissible.

1. The *Crawford* Decision.

Crawford held that the Confrontation Clause bars the introduction of testimonial hearsay at a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. "Where testimonial

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[4] The state appealed only from Judge Schroeder's August 4, 2004, order finding that certain statements by Mrs. Jensen are testimonial. Likewise, Jensen's cross-appeal is limited to the portion of Judge Schroeder's order finding that other of Mrs. Jensen's statements are not testimonial. In *State v. Manuel*, 2005 WI 75, ¶60, 281 Wis. 2d 554, 697 N.W.2d 811, this Court held that nontestimonial statements still should be evaluated for confrontation clause purposes under the *Roberts* test. Judge Schroeder's findings under *Roberts* admitting some statements and excluding others were not reduced to a written order and they are not the subject of either the state's appeal or Jensen's cross-appeal.

statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69. Thus, with respect to testimonial evidence, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. *Crawford* declined, however, to define "testimonial statements," deciding to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.*.

Without endorsing or rejecting any potential "comprehensive definition" of "testimonial," the Court quoted three proposed formulations of "testimonial statements":

> 1. "*Ex parte*, in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarant would reasonably expect to be used prosecutorially."

Brief for Petitioner 23.

> 2. "Extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions,"

White v. Illinois, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992)(Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

> 3. "Statements that were made under circumstances which would lead an objective witness reasonably to believe

> that the statement would be available for use at a later trial."
>
> Brief for National Association of Criminal Defense Lawyers, et al. as Amici Curiae.

Crawford, 541 U.S. at 51-52.

In *Crawford*, the declarant's statements were made during police questioning. Accordingly, the Court found it unnecessary to determine the parameters of what constitutes a "testimonial statement." The Court stressed that "under even a narrow standard," statements taken by police during interrogations are testimonial. *Id.* at 52. "Whatever else the term covers, it applies *at a minimum* to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68 (emphasis added). There is no requirement that the witness's prior statement have been under oath. *Id.* at 52.

Crawford thus does not hold, nor suggest, that testimonial statements are restricted to the categories specifically identified in the Court's opinion. To the contrary, the Court's comment that "whatever else the term covers," strongly indicates that "testimonial" encompasses statements falling outside the three categories identified in *Crawford*. *Crawford*, in describing the three proposed definitions of "testimonial," indicated that these were efforts to define the "core class" of testimonial statements, thus suggesting that other types of statements at the periphery of the "core" defined by these formulations also are testimonial. *Crawford* also

indicates that the confrontation right protects the accused not only from abuses that existed at the time of the founding, but also from abuses in modern-day situations that the Framers would have found abusive if they had existed then. *Id.* at 52 n. 3.

Accusatory letters to police are one category of evidence that are barred under *Crawford* absent an opportunity for cross-examination. In discussing Sir Walter Raleigh's case, the Court noted that Raleigh's accuser, Lord Cobham, had implicated Raleigh in an examination before the Privy Council and in a letter. *Id.* at 44. The injustice of reading these statements at Raleigh's trial without affording him the opportunity to cross-examine Cobham sparked the reforms that led to securing the right to confrontation in England. In adopting these reforms, there is no reason to suppose that the English courts considered Lord Cobham's statements to interrogators improper, but his letter repeating the same allegations unobjectionable. *Crawford* certainly did not recognize any distinction between Lord Cobham's letter and his *ex parte* examination. *See also California v. Green*, 399 U.S. 149, 156-57 (1970) (recognizing that at common law the prisoner frequently demanded the right to meet his accusers face to face when the prosecutor's proof was "given by reading depositions, confessions of accomplices, letters, and the like") (citing 1 J. Stephen, A History of the Criminal Law of England 326 (1883)).

For confrontation purposes there is no reasonable distinction between an accusatory letter to police and accusations made to police during a question and

answer session. In holding that the right of confrontation included unsworn testimonial statements as well as those made under oath, *Crawford* found "it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK." 541 U.S. at 52 n.3 (emphasis in original). It is similarly implausible to believe that a provision which prohibits the use of a statement obtained when a police officer hands a piece of paper to a witness to write a statement implicating another would allow the use of the same written statement so long as the witness wrote it without invitation and then provided it to police. Recognizing such a distinction would inevitably lead to abuse as witnesses would learn or be encouraged to independently provide statements to potentially avoid testifying in court.

2. The *Manuel* Decision.

In *Manuel*, this Court declared that "[f]or now, at a minimum," statements falling within any of the three formulations identified in *Crawford* are testimonial. 2005 WI 75, ¶39. Thus, as the state recognizes, Mrs. Jensen's letter and voicemail are testimonial if they qualify under any of the *Crawford* formulations. State's Brief at 9.

3. The Circuit Court's Decision.

Judge Schroeder concluded that Mrs. Jensen's letter, voicemail, and statements to police are testimonial because they were accusatory and made for prosecutorial purposes. The circuit court's factual findings regarding the anticipated use of the the

evidence must be accepted by this Court unless they are clearly erroneous. *Jackson*, 216 Wis. 2d at 655. They are not.

Judge Schroeder provided compelling reasons for finding that Mrs. Jensen's voicemail and letter to police are testimonial:

> And I think one of the things that needs to be remembered is that the right of confrontation is a protection, not just against governmental or police authorities, but also against condemnation of an individual by a poison-penned letter. . . .
>
> The purpose of the accusation – the purpose for which the utterance is made, I guess, is the best way to put it – is what dictates whether it's a testimonial statement or not. And so I definitely think that the circumstances in this case suggest that the letter was intended exclusively for accusatory and prosecutorial purposes. I can't imagine any other purpose in sending a letter to the police that is to be opened only in the event of her death other than to make an accusatory statement given the contents of this particular letter. And even to the extent that it denies a suicidal intent, it is an integral part of the accusation to further show that it's an accusatory statement, and it even uses the word "suspect" in reference to the defendant. . . .

R110:4-6; A-Ap. 110-112.

Although Judge Schroeder made his ruling before *Manuel* adopted all three definitions of "testimonial" set forth in *Crawford*, he correctly anticipated a test requiring the circuit court to determine the purpose for which the statements were made. Judge Schroeder found that the letter was intended exclusively for accusatory and prosecutorial purposes *and* there could be no "other purpose in sending a letter

to the police that is to be opened only in the event of her death other than to make an accusatory statement given the contents of this particular letter." R110:5; A-Ap. 111. Judge Schroder accurately summarized the reasons Mrs. Jensen's letter and voicemails are testimonial.[5]

The state criticizes Judge Schroeder's failure to recite verbatim the third *Crawford* formulation that the "statements were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." State's Brief at 9. The state further suggests that Judge Schroeder improperly focused only upon Mrs. Jensen's subjective expectations, rather than the expectations of a reasonable person in Mrs. Jensen's position. State's Brief at 9-10.

To the contrary, Judge Schroeder's remarks plainly reflect his determination that an objective person in Mrs. Jensen's position would reasonably believe the letter and the voicemail would be available for use as evidence implicating Mark. In opining that he could not "imagine any other purpose for the letter," Judge Schroeder found that the circumstances under which the letter was written established not only Mrs. Jensen's intent, but the intent of anyone writing such a letter. A reasonable person in her position would have anticipated the statement's potential use as evidence. Indeed, Mrs. Jensen took an additional step to ensure that the letter would

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[5] Even before *Crawford*, Judge Schroeder considered the letter "created evidence." (R108:136).

reach police hands when she informed Officer Kosman that she left a letter with her neighbor. Mrs. Jensen's accusations, consisting of essentially unsworn affidavits directed to law enforcement officers to encourage an investigation, establish from either an objective or subjective viewpoint that the statements would be available for use as evidence against Mark.[6] Accordingly, Judge Schroeder properly found them to be testimonial.

4. Mrs. Jensen's Statements to Police by Letter and by Voicemail Are Testimonial.

The state concedes that Mrs. Jensen's statements to Officer Kosman at the Jensen home fall squarely within the core category of testimonial statements recognized in *Crawford*. State's Brief at 7 n.2. As in *Crawford*, the statements were made in response to police questioning during a police investigation. Therefore, the Sixth Amendment bars the use of the statements against Mr. Jensen at trial.

a. Testimonial Statements Need Not be Elicited by Police.

The state seeks to distinguish the statements made in person to Kosman from those by voicemail and letter because Kosman did not elicit the latter statements. State's Brief at 11.[7] That distinction does not warrant different treatment. First, as

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[6] *See infra* at 21-23, discussing the reasons the Court also should examine the defendant's subjective intent.

[7] Although the court considered whether the admission of the voicemails violated the confrontation clause under *Crawford*, the court already had excluded the voicemails as inadmissible hearsay (R107:93). Thus, even if the voicemails are not testimonial, they still must be excluded (continued...)

noted above, one of the abuses in Raleigh's case was the use at trial of Lord Cobham's letter to the Privy Council.[8] Thus, letters to the government fall within the historical conception of testimonial. Voicemails or other recorded statements are modern equivalents. Written evidence was of special concern to the Framers. As *Crawford* notes, the Federal Constitution's initial failure to include a confrontation guarantee led a prominent Antifederalist writing under the pseudonym Federal Farmer to criticize the use of written evidence. "'Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . . [W]ritten evidence ... [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.'" *Id.* at 49 (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 469, 473). The First Congress responded to the criticism by including the Confrontation Clause in the proposal that became the Sixth Amendment. *Id.*

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[7](...continued)
under *Roberts*. *Manuel*, 2005 WI 75, ¶60. Further, while the state asserts that "Julie's voicemail did not suggest that Jensen might be plotting a crime," State's Brief at 13, Officer Kosman testified that "Julie Jensen . . . basically told me, I think I am having a little problem here, I think Mark is trying to kill me, would you contact me as soon as you get back." R100:43. The voicemail thus is accusatory and testimonial.

[8] Cobham wrote two letters to the Lords, one nine days after his examination before the Privy Council and one just before trial many months later. The second letter explained away Cobham's recantation of his accusation against Raleigh. There is no indication that the first letter was solicited by the Council; the second was stated to be unsolicited.

See R. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 545 (2005).

Second, *Crawford* announces a rule of court procedure, not police procedure. While the Framers' greatest fear may have been prosecutions by *ex parte* affidavits obtained by government inquisitors, because that was the context in which the most egregious historical abuses occurred, the overarching concern was that accusations against the accused be tested by confrontation. The Confrontation Clause "requires not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Like the other Sixth Amendment rights, the confrontation right is foremost a trial protection, not a protection from police misconduct. Indeed there is nothing improper about police taking ex parte examinations so long as they are not admitted against the accused without calling the witness.

Although apparently not prompted by police action, Mrs. Jensen's statements nonetheless pose the same dangers of unreliability because they have not been tested by cross-examination. Regardless whether the police elicited the witness's statement, cross-examination protects the defendant from malicious falsehoods, misstatements, false imaginations, and misinterpretations. It is difficult to believe that *Crawford*, which flatly bars the use of an affidavit to police without cross-examination, allows the admission of an identical statement so long as the witness prepares it herself and gives it to police. Similarly, the only apparent difference between Mrs. Jensen's voicemail messages and the statements to Kosman at her home are that the statements

at the home were preceded by a question from Kosman. That question may have been as simple as, "Why did you want to talk to me?"

In *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004), the court explained why statements that are unsolicited by police must be considered testimonial if the declarant would have anticipated their potential use in the investigation or prosecution of a crime:

> Indeed, the danger to a defendant might well be greater if the statement introduced at trial, without a right of confrontation, is a statement volunteered to police rather than a statement elicited through formalized police interrogation. One can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation. . . . If the judicial system only requires cross-examination when someone has formally served as a witness against a defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally. [Footnote omitted]. The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

Id.

b. Accusatory Statements Directed to Police are Testimonial.

The state contends that the letter and voicemail are not testimonial because they were created before any crime had been committed so there was no expectation that the letter would be used as evidence. The state's position is not factually or legally accurate.

First, according to the state's theory of prosecution, Mr. Jensen's criminal activity already was underway at the time of the letter and voicemail. The state contends, based on information provided by Mrs. Jensen and computer data, that Mark had been plotting and taking affirmative steps to kill his wife for many weeks. *E.g.,* R1; R110:11, 14. Mrs. Jensen's statements are accusations describing Mark's supposed ongoing criminal activities.

Second, the question of whether an objective person in the declarant's position reasonably would believe the statement may be used for evidentiary purposes should be answered in the affirmative when the statement is accusatory and intended for police. *See* R. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1043 (1998) [hereinafter Friedman, *Basic Principles*]; *See also* R. Friedman, *Confrontation and the Definition of Chutzpa*, 1-3 Israel Law Review 506, 514 (1997) ("To be deemed a witness for purposes of the confrontation right, the declarant should have recognized at the time of the statement that in some sense she was bearing witness. *This occurs when the declarant makes a statement either*

directly to a law enforcement officer or through an intermediary, that she realizes will likely aid in the investigation or prosecution of a crime.") (emphasis added).[9] The focus of the inquiry is whether the declarant envisions the statement's potential use in a criminal investigation or prosecution. *See United States v. Arnold*, 410 F.3d 895, 903 (6th Cir. 2005) ("On all three occasions, Gordon made the statements to government officials: the police. This fact alone indicates that the statements were testimonial . . . .").

Professor Friedman explains why accusatory statements generally are testimonial:

> If the declarant has made an accusatory statement, she has lined up against the accused, or at least with the prosecution. It is in this situation that the right to confront should attach. This is not merely a matter of preference in designing a truth-determining process. Rather, it is a matter of fundamental right, to preserve both fairness and the perception of fairness. It is unsatisfactory to punish an accused without giving him an opportunity to confront those who have borne witness against him, consciously making statements that might lead to his conviction.

Id.

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[9] In several law review articles prior to *Crawford*, University of Michigan Professor Friedman advocated the testimonial approach later adopted by *Crawford*. Friedman, *Basic Principles, supra* at 1043; Friedman and McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1242-1243 (2002); *Confrontation and the Definition of Chutzpa, supra* at 514. *Crawford* identifies Friedman as one of the academics critical of the *Roberts* rule who had urged the Court to abandon it in favor of a doctrine which more accurately reflects the original understanding of the Clause. *Crawford*, 541 U.S. at 60-61. In large measure the Court adopted Friedman's proposal for following a "testimonial" approach to the Sixth Amendment.

Professor Friedman suggests that whether a given statement is testimonial can usually be resolved by the following rules of thumb:

> A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made directly to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.

Friedman, *Basic Principles*, *supra*, at 1040-43.

Professor Friedman's statement that "if, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial," should not be misinterpreted as supporting the position that Mrs. Jensen's statements are not testimonial. Although Professor Friedman does not elaborate, he more recently has clarified that he is not speaking of situations like this one. *See* R. Friedman, *Grappling with the Meaning of "Testimonial,"* Draft Paper, available at http://www-personal.umich.edu/%7Erdfrdman/Grappling1.pdf. [hereinafter Friedman, *Meaning of Testimonial*]. In that draft paper, Professor Friedman states that he does "not believe the statement needs to have been made *for*

the purpose of aiding a criminal prosecution to be deemed testimonial." *Id.* at 4-5 (emphasis in original). In pondering what prosecution satisfies the definition, he asks:

> Does any crime have to have been committed yet? Not necessarily; her (sic) I have in mind the cases in which an eventual murder victim, fearing her assailant, tells a confidante information to be used in the event that she does in fact assault her and render her unable to testify.

Id. at 5 n.5.

Under the circumstances here, it does not matter that Mrs. Jensen's statements were made before the charged crime. As the trial court found, they were made "for accusatory and prosecutorial purposes." (R110:5). They also were made to law enforcement. Accordingly, they are testimonial.

The state claims that an "objective witness reading Julie's letter"would not reasonably believe the letter would be used as evidence, but that is a misleading framing of the issue. State's Brief at 11. The focus is on the anticipated use of the statement by the person who made it (or the reasonable person in the declarant's position), not the perspective of a witness reading or hearing the statement. *E.g., United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) ("we hold that a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime"). In *Summers*, for example, the declarant's unsolicited statement to police immediately after his arrest of "How did you guys find us so fast?" was deemed

testimonial because it was objectively foreseeable to a person in the declarant's position that the statement "might be used in a subsequent investigation or prosecution."

The state contends that the focus under the third *Crawford* formulation is the expectation of a reasonable person in the declarant's position rather than the subjective purpose of the particular declarant. State's Brief at 10. Because Mrs. Jensen's statements are testimonial whether analyzed from an objective or subjective perspective, it likely is unnecessary for this Court to determine whether the test should be subjective, objective, or either one. A statement should be considered testimonial if the declarant actually anticipated that the statement might be used for investigative or prosecutorial purposes or if an objective person in the declarant's position would reasonably believe the statement might be used for those purposes. The central issue is whether the declarant intended to bear testimony against the accused. *Crawford*, 541 U.S. at 52 (Confrontation Clause text applies to those who bear testimony against accused); *Cromer*, 389 F.3d at 675. The trial court correctly focused on this issue, considering factors relevant to either a subjective or objective test. As Friedman has noted, in most cases the choice of a subjective or objective test will make little difference. Friedman, *Meaning of Testimonial* at 7. If a subjective test is used, the court often will determine what the declarant's anticipation was by relying largely on surrounding circumstances; thus the court "would infer that the declarant did (or did

not) anticipate use in prosecution from its perception that a reasonable person in the declarant's position would (or would not) anticipate such use." *Id.*

The state correctly points out that most courts, following the language of the third formulation in *Crawford*, have characterized the inquiry as an objective one, but these cases have not rejected a subjective analysis. *E.g., Summers*, 414 F.3d at 1302. *Summers* quoted *Cromer*, 389 F.3d at 675: "'The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, *may* be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.'" (emphasis added). *See also United States v. Saget*, 377 F.3d 223 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 938 (2005) ("*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial"). Thus, these cases recognize that one way to show whether the declarant intended to bear witness against the accused is by the objective test, but they do not hold that to be the only way. The objective test is sensible because in many cases there will be no evidence of the declarant's intent or the declarant, as in the case of a child witness, would not understand the purpose of a police interview, for example. *E.g., State v. Snowden*, 867 A.2d 314, 329 (2005) (holding that the "objective test," when dealing with the statements of a child, means an objective person, rather than

an objective child of the same age). However, the state does not explain why a court should not find a statement testimonial if the circumstances demonstrate that, in fact, the declarant anticipated prosecutorial use of her statement. Where the facts demonstrate that the declarant subjectively intended to bear witness against the accused, that should be sufficient to find the statement testimonial given that the witness actually intended her statement as evidence. *See Snowden*, 867 A.2d at 326 (suggesting that declarant's actual awareness of the statement's likely use as evidence renders the statement testimonial). Otherwise the objective test should be employed.

The state also contends that if Julie's subjective intent is relevant, then the court erred in concluding "that Julie intended her letter to be used only for accusatory and prosecutorial purposes . . . ." State's Brief at 11. The state complains about the circuit court's factual findings, including its findings regarding Mrs. Jensen's motives in writing the letter and the nature of her suspicions, but does not address the standard of review or explain why the circuit court's findings are clearly erroneous.

The letter and voicemail are testimonial because Julie reasonably anticipated that the statements would be used for the investigation and/or prosecution of her husband. Her whole purpose in making the statements was to frame Mark or to identify him as a suspect if something happened to her as she was predicting. Since she believed (or knew) that something would happen to her, she also believed the statements would be used prosecutorially. These were not casual remarks, but

calculated accusations to police by unsworn affidavit. These statements are precisely the type that the Sixth Amendment's prohibitions were intended to guard against.

II. The Forfeiture by Wrongdoing Doctrine is Inapplicable.

The state urges this Court to require a hearing on whether Mrs. Jensen's testimonial statements should be admitted under the doctrine of forfeiture by wrongdoing. No hearing is necessary because even if this Court recognizes the doctrine, forfeiture by wrongdoing only applies where the defendant's alleged wrongdoing was for the purpose of preventing the witness from testifying. As Judge Schroeder concluded, there is no such evidence here.

Crawford relied heavily on the intent of the Framers, finding that the defendant's Sixth Amendment right to be confronted with the witnesses against him "is most naturally read as a reference to the right of confrontation at common law, *admitting only those exceptions established at the time of the founding.*" (emphasis added). Because the broad forfeiture by wrongdoing principle proposed by the state did not exist at common law, the application of this broad principle would violate the Confrontation Clause.

A. The Forfeiture by Wrongdoing Doctrine Does Not Apply Unless the Accused Acted with the Purpose of Preventing the Witness from Testifying.

1. The Broad Forfeiture By Wrongdoing Exception Proposed by the State Is Contrary to the Common Law Scope of the Exception.

Crawford identified two common law exceptions to the rule that testimonial statements are inadmissible absent a prior opportunity to cross-examine the declarant: dying declarations and forfeiture by wrongdoing. The common law roots of these exceptions is important. *Crawford* emphasized that testimonial statements were inadmissible regardless of the applicability of any modern day hearsay exceptions, emphasizing that "only those exceptions established at the time of the founding" could possibly overcome the bar against testimonial statements not subject to cross-examination. *Crawford*, 541 U.S at 53-54.

Crawford stressed that the text of the Sixth Amendment "does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54. The Court, in discussing the scope of the hearsay exception for spontaneous declarations, noted that "to the the extent that a hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made 'immediate[ly] upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage.'" *Id.* at 58 n. 8 (citation omitted).

Thus, *Crawford* indicates that the scope of any exceptions to the confrontation requirement recognized in 1791 cannot be broadened when applied today.

Jensen acknowledges that forfeiture by wrongdoing has historical roots that predate the founding. The critical question, however, is the scope of the exception. The history of the doctrine reveals that, even at its broadest, the doctrine is limited to cases where the defendant acted with the purpose of preventing the declarant's appearance as a witness.

The only United States Supreme Court case to apply the forfeiture by wrongdoing doctrine to the confrontation right is *Reynolds v. United States,* 98 U.S. 145 (1878). While the state suggests that *Reynolds* recognized a broad rule of forfeiture, in fact, the scope of the forfeiture principle recognized in *Reynolds* is quite narrow.

In *Reynolds*, the defendant was convicted of bigamy based in part on testimony given by Schofield at an earlier bigamy trial under another indictment. The Court held that the prior testimony, which had been subject to cross-examination by Reynolds, was properly admitted at trial, finding that the evidence was sufficient to establish that Reynolds was instrumental in concealing or keeping Schofield (Reynolds' alleged second wife) away from trial. The Court held that this result was consistent with the longstanding rule set forth in *Lord Morley's Case*, 6 State Trials 770 (1666), and recognized in later English and state court cases. The Court noted

that the rule was sufficiently ingrained that "in the leading text-books, it is laid down that if a witness is kept away by the adverse party, his testimony, *taken on a former trial between the same parties upon the same issues*, may be given in evidence." *Reynolds,* 98 U.S. at 158-59 (emphasis added).

In *Reynolds*, the Court examined whether the evidence demonstrated that Reynolds caused the witness's absence. After concluding he had, thereby making it clear "that the judgment should not be reversed because secondary evidence was admitted," the Court then considered whether the defendant had had a prior opportunity to confront the former testimony. *Id.* at 160. In *Reynolds*, the former testimony was deemed properly admitted because the "accused was present at the time the testimony was given and had full opportunity of cross-examination." *Id.* at 161.

Reynolds demonstrates that the defendant's procurement of a witness's absence did not render the witness's statements automatically admissible. Rather, the defendant's wrongdoing in causing the witness's absence merely excused the prosecution from the requirement of producing the witness at trial. The testimony still was not admissible unless the defendant had had a prior opportunity to cross-examine the witness. By analogy to *Crawford*, the rule in *Reynolds* would eliminate the "unavailability" requirement, but not the requirement of a prior opportunity to cross-examine the witness.

Similarly, in *Lord Morley's Case*, 6 State Trials 769 (1666), relied upon in *Reynolds*, proof of witness tampering by the defendant excused the personal appearance of the witness, but did not amount to a full confrontation waiver. The court was asked to rule on the admissibility of depositions taken by the coroner. Some witnesses that had been deposed were dead or unable to travel, some witnesses could not be located despite the prosecution's best efforts, and at least one witness was alleged to be unavailable due to the actions of Lord Morley. *Id.* at 770-71. The court held that the depositions of witnesses who were dead or unable to travel could be read, that the depositions of those witnesses who could not be found could not be read, and that the deposition of any witness whose absence was procured by the defendant could be read. *Id.* The prosecution failed to prove that Lord Morley procured the absence of any witness so no depositions were read on that justification. *Id.* at 776-77. Thus, in *Lord Morley's Case*, the alleged misconduct of the defendant in tampering with a witness caused the court to analyze the admissibility of the witness's deposition testimony in the same way the court analyzed the admissibility of deposition testimony of a witness missing due to an untimely death. The issue was one of availability, not opportunity to cross-examine. *Lord Morley's Case* does not suggest a full forfeiture of the right of confrontation if witness tampering is proven.[10]

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[10] As *Crawford* recognized, when *Lord Morley's Case* was decided in 1666, the admissibility of an unavailable witness's pretrial examination, where there had been no opportunity for cross-examination, still was unsettled. 541 U.S. at 45-46, 54 n.5. *Crawford* identifies *King v. Paine*, 5 (continued...)

Reynolds also relied upon *The Queen v. Scaife*, 117 Eng. Rep. 1271, 1273 (Q.B. 1851). There, a witness's prior deposition testimony was admitted against the defendant because he had wrongfully procured the witness's absence. However, the deposition had been taken in the defendant's presence and the statute provided that depositions of unavailable witnesses only were admissible if the defendant or his counsel had a prior opportunity to cross-examine the witness. *Id.* at 1273 n. (a)1.

The scope of the forfeiture by wrongdoing exception at common law would not permit the admission of Mrs. Jensen's statements in this prosecution. *Reynolds* merely provides that a defendant cannot complain about his inability to question a witness *at trial* if he intentionally caused the witness's absence from trial. The evidence still was inadmissible unless the accused had a prior opportunity to cross-examine the declarant. That remained the prevailing rule in this country well into this century. *See* J. Kroger, *The Confrontation Waiver Rule*, 76 B.U.L. Rev. 835, 891-93 (1996) (recognizing that the "Morley rule" fell into desuetude in the eighteenth century, that "nineteenth century courts and legal scholars commonly accepted the idea that the Morley rule applied only to previously 'crossed' statements," and the common law "supplies little or no support" for admitting uncrossed statements on a forfeiture theory given that "no common law court since 1692 admitted uncrossed

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[10](...continued)
Mod. 163, 87 Eng. Rep. 584 (1696), as settling the rule requiring a prior opportunity for cross-examination as a matter of common law. *Id.*

statements on a waiver theory before the Eighth Circuit did in *United States v. Carlson*"); J. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation*, 51 Drake L. Rev. 459, 464-65 (2003). Further, the cases in which the forfeiture exception was found applicable, including *Reynolds* and *Lord Morley's Case*, were witness tampering cases.

Thus, to the extent the forfeiture by wrongdoing exception was recognized in this country at common law, it only applied when: (a) the defendant had a prior opportunity to cross-examine the witness at a former trial or at a deposition under oath; and (2) the defendant wrongfully procured the absence of the witness to prevent her from testifying. At least one state rejected the exception altogether. *Bergen v. People*, 17 Ill. 426, 427 (1856) ("Here the witness was not dead, but beyond the jurisdiction of the court, by the procurement of the defendant; and we think the rules of evidence do not permit, in such case, the admission of the testimony given on the former occasion").

2. The Forfeiture by Wrongdoing Doctrine Does Not Apply Where the Defendant Did Not Obstruct Justice by Procuring the Witness's Absence to Prevent Her From Testifying.

For nearly 100 years after *Reynolds*, the forfeiture by wrongdoing doctrine garnered little attention from the courts and apparently was rarely used until the principle was resurrected and expanded in *United States v. Carlson*, 547 F.2d 1346

(8th Cir. 1976).[11] In *Carlson,* the court admitted a witness's grand jury testimony after finding that the witness's refusal to testify was caused by the defendant's threats. *Id.* at 1359. *Carlson* appears to be the first federal case applying the forfeiture doctrine to a situation where the defendant had no prior opportunity to cross-examine the witness.

Even the recent history of the forfeiture by wrongdoing doctrine prior to *Crawford* reveals that the doctrine was applied only where: (a) the defendant caused the unavailability of the witness; *and* (b) did so for the purpose of preventing the witness from testifying. *E.g., United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982) ("We conclude that a defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right to confrontation . . ."); *United States v. Mastrangelo*, 693 F.2d 269, 272-73 (2d Cir. 1982); *Steele v. Taylor*, 684 F.2d 1193, 1201-03 (6th Cir. 1982); *United States v. Houlihan*, 92 F.3d 1271, 1280-81 (1st Cir. 1996) (defendants ordered the victim killed to prevent him from cooperating with police against them as to their drug activity); *United States v. White*, 116 F.3d 903, 913 (D.C. Cir. 1997); *United States v. Dhinsa,* 243 F.3d 635, 651-54 (2d Cir. 2001) (collecting cases). *Dhinsa* reiterates that the

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[11] The only pre-1976 appellate case we in which the court relied on *Reynolds* to admit former testimony due to the misconduct of the defendant is *State v. Maynard*, 184 N.C. 653, 113 S.E.2d 682 (1922). In *Maynard*, as in *Reynolds*, the former testimony was admitted due to the defendant's misconduct in procuring a witness's absence. However, as in *Reynolds* the defendants had had a prior opportunity to cross-examine the witness (at a preliminary trial).

forfeiture by wrongdoing doctrine requires the government to show the defendant "acted with the intent of procuring the declarant's unavailability as an actual or potential witness." *Id.* at 654.

The state cites a number of pre-*Crawford* state cases in which courts recognized forfeiture by wrongdoing, but all these cases adopted a forfeiture rule like the federal one requiring proof that the defendant's wrongdoing was intended to procure the unavailability of the declarant as a witness. Post-*Crawford* cases adopting forfeiture by wrongdoing also characterize the rule in those terms. *E.g.*, *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005); *State v. Alvarez-Lopez*, 98 P.3d 699, 704-05 (2004) (declining to apply forfeiture where no showing that defendant's actions were intended to procure witness's absence).

The modern doctrine does not apply where the defendant allegedly caused the witness's unavailability, but not for the purpose of preventing the witness from giving evidence. Several cases decided prior to *Crawford* explicitly rejected the state's position that waiver or forfeiture applies to cases where the alleged murder was not for the purpose of preventing testimony. *E.g.*, *Wyatt v. State*, 981 P.2d 109, 115 n.11 (Alaska 1999) (holding that forfeiture by misconduct does not apply to domestic homicide); *People v. Maher*, 677 N.E.2d 728, 731 (N.Y. 1997) (holding that misconduct exception does not apply to murder unrelated to testimony); *Commonwealth v. Laich*, 777 A.2d 1057, 1062 n.4 (Pa. 2001) (rejecting the

misconduct exception in manslaughter prosecution because "the exception only applies when a party's wrongdoing is done with the intention of making the witness unavailable to testify as a witness . . . [a]nd if a party's wrongdoing was for another purpose, *e.g.*, killing the declarant based upon personal animosity, the exception does not apply").

Cases like *Carlson, Thevis,* and *Mastrangelo* expanded the scope of the forfeiture by wrongdoing doctrine substantially beyond its common law roots and *Reynolds*. The purpose of this expansion was to prevent the obstruction of justice by witness tampering and, in this respect, the cases at least bore some arguable resemblance to cases where the defendant was deemed to have waived constitutional rights by misconduct that undermined the administration of justice in a pending case. *E.g., Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (defendant's disruptive courtroom conduct permitted his removal from courtroom during trial); *Taylor v. United States*, 414 U.S. 17 (1973) (by voluntarily absenting himself during trial, defendant waived right to confront witnesses). Nonetheless, even under this expanded interpretation of forfeiture by wrongdoing, Mrs. Jensen's statements are inadmissible because Judge Schroeder concluded that if Mr. Jensen caused her absence, he did not do so for the purpose of preventing her from testifying (R110:10, 21).

Similarly, Rule 804(b)(6) of the Federal Rules of Evidence, entitled "Forfeiture by Wrongdoing," enacted in 1997, requires proof that the party's purpose in causing

a witness's absence was to prevent her from testifying. The language of the rule provides that the wrongdoing must have been "intended to...procure the unavailability of the declarant *as a witness*." *See Dhinsa*, 243 F.3d at 653-54 (holding that Rule 804(b)(6), like prior precedents, requires that the defendant was motivated to silence a witness or potential witness); *see also* 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 804.03[7][b], at 804-28 (2d ed. 2002) (recognizing that a "party who murdered a person because he hated him or for any reason other than preventing him from testifying would not forfeit the hearsay objection"); 4 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual*, §804.02[17], at 804-42–43 (8th ed. 2002) ("Under the Rule, it must be shown that the party against whom the evidence is offered acted with intent to procure the unavailability of the declarant as a witness. If the defendant kills a declarant simply because he did not like him, or because he was burned in a drug deal by him, then the defendant has not forfeited his right to object to the declarant's hearsay statement. It follows that the defendant in a murder case cannot be held to have forfeited his objection to hearsay statements made by the victim").

The state cites two cases that it argues extended the forfeiture by wrongdoing doctrine to situations where the defendant's actions were not shown to be for the purpose of preventing a witness from testifying. Closer examination reveals that these cases also involve witness tampering and therefore are distinguishable from

Jensen's case. To the extent these cases recognize a broader forfeiture by wrongdoing exception, they are in conflict with the common law scope of the exception, which *Crawford* makes clear must define the scope of any exception to the confrontation clause.

In *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999), the Eighth Circuit affirmed the admission of a murder victim's statements to federal law enforcement agents where the defendant accused her of cooperating and threatened her for doing so. Although the defendant was charged only with one offense, murder, that charge was murder of an informant in violation of the federal witness-tampering statute, the *mens rea* element of which requires intent to prevent the victim from attending or testifying at an official proceeding or communicating information to the police or the judiciary about the commission of federal offenses. 18 U.S.C. § 1512(a)(1)(A), (C). Thus, the victim's statements were admitted to prove the defendant's motive for killing her. *Id.* at 925-26.

In *United States v. Miller*, 116 F.3d 641, 668 (2d. Cir. 1997), the court stated that "we have never indicated that *Mastrangelo* did not apply to a defendant's procurement of the unavailability of the declarant unless there was an ongoing proceeding in which the declarant was scheduled to testify . . . ." However, in *Miller*, which involved a large scale RICO and Continuing Criminal Enterprise allegation, the prosecution's theory was that the declarants had been murdered because the

defendants "made it a practice to murder members whose cooperation with authorities was suspected or who posed a threat to the gang's operations." *Id.* at 669. Thus, as in the other forfeiture cases, the defendants were found to have caused the unavailability of the declarants for the purpose of silencing potential witnesses even though there was no ongoing proceeding. This interpretation is confirmed by *Dhinsa*, in which the Second Circuit after *Miller* (and citing *Miller*) reiterated that there must be a finding that the defendant acted with the intention of preventing the declarant from testifying at a future trial. *Dhinsa*, 243 F.3d at 654.

Crawford appears to have generated a dramatic increase in claims of forfeiture by wrongdoing by prosecutors. While *Crawford* acknowledged the continued vitality of the doctrine, the Court did not suggest an expanded role for the principle or a looser standard for its application. To the contrary, *Crawford* emphasizes that the only exceptions to the right of confrontation are the ones the Framers recognized in 1791. Certain courts, apparently dissatisfied with the results created by *Crawford*'s application, have stretched the forfeiture by wrongdoing exception far beyond its common law roots, and even beyond the modern day application of the doctrine. *E.g., State v. Meeks,* 88 P.3d 789, 794 (Kan. 2004); *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005); *Gonzalez v. State,* 155 S.W.3d 603 (Tex. Crim. App. 2004); *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005); *but compare State v. Ivy*, 2004 WL 3021146, *14 (Tenn. Crim. App. 2004) (post-*Crawford* case

holding that forfeiture by wrongdoing exception requires proof that murder defendant acted with the intent to procure the victim's unavailability as witness at the proceeding in which admission is sought, and recognizing that expanding the rule to include unavailability at other potential future proceedings would lead to wide-spread abuse); *United States v. Jordan*, 2005 WL 513501 (D. Colo. March 3, 2005) (holding forfeiture by wrongdoing doctrine inapplicable where defendant allegedly killed witness but no showing that for purpose of preventing testimony). The state's proposed expansion of the doctrine is unconstitutional.

Meeks relies on Professor Friedman, who champions the broad use of forfeiture. Although Professor Friedman's "testimonial" approach to the Confrontation Clause was adopted in *Crawford*, his views on forfeiture were not. More importantly, neither Professor Friedman nor the post-*Crawford* cases extending forfeiture identify a common law foundation for this remarkable expansion of the forfeiture by wrongdoing doctrine. The doctrine is justified merely on policy grounds in contravention of the Court's warning in *Crawford* against expanding or developing new exceptions to categorical constitutional guarantees. The cases cited by the state such as *Gonzalez*, *Meeks*, *Mayhew*, and *Garcia-Meza*, fail to consider the narrow common law scope of the forfeiture exception.

In *Crawford*, the Court said that dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the

defendant is obviously guilty. 541 U.S. at 62. That is not much different than the problem here. The state claims that dispensing with confrontation is acceptable if pretrial evidence merely shows the defendant's guilt by a preponderance of evidence.

The requested expansion of the forfeiture by wrongdoing rule is directly contrary to *Crawford*'s directive that confrontation clause exceptions not be broader than fixed at the time of the founding. The state seeks to justify the expansion by raising the specter of the domestic violence victim whose voice is not heard in the courtroom. If guilt is assumed, then any enforcement of the accused's constitutional rights arguably creates a potential for injustice. On the other hand, admitting untested hearsay statements upon a finding that the defendant forfeited his right to confrontation, without regard for the reliability of the statements, certainly increases the risk of convicting the innocent. After all, cross-examination, as the "'greatest legal engine ever invented for the discovery of truth,'" *Green*, 399 U.S. at 158 (citation omitted), frequently exposes the underbelly of a facially truthful statement. *Crawford* recognized that its rule would result in the exclusion of evidence previously deemed reliable and therefore admissible under *Roberts*, but warned against creating new exceptions to compensate for the change. Courts and legislatures are not free to narrow the breadth of the constitutional protections established by the Framers on policy grounds.

Finally, we address briefly the state's argument regarding dying declarations. State's Brief at 29-33. Judge Schroeder indicated that extending the scope of the forfeiture by wrongdoing doctrine would essentially render the hearsay exception for dying declarations superfluous. The state demonstrates that the exception for dying declarations and the broad waiver by wrongdoing exception proposed by the state are not necessarily coextensive. The state's exposure of the trial court's erroneous premise, however, does not demonstrate that the forfeiture by wrongdoing doctrine should be "extend[ed]" to the present situation as submitted by the state. State's Brief at 29.

First, because of the likelihood of the exceptions overlapping, Judge Schroeder's point that the forfeiture by wrongdoing doctrine would have made it unnecessary to develop the dying declarations rule has merit. In many cases there would be no reason to apply the dying declarations rule if forfeiture were a recognized exception.

Second, Judge Schroeder's larger point is that our justice system always has declined to adopt a "murder exception" to the confrontation right, as demonstrated by the specific requirements of proof necessary to admit a dying declaration.[12] The

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[12] *Accord Shepard v. United States*, 290 U.S. 96 (1933). In *Shepard*, the Court reversed the defendant's murder conviction for poisoning his wife with bichloride of mercury based on the improper admission of statements by his wife. Mrs. Shepard, then ill in bed, asked her nurse to retrieve a bottle of whisky from a shelf in the defendant's room. When the bottle was produced, she told the nurse that this was the liquor she drank just before collapsing. Mrs. Shepard asked whether (continued...)

extension of the forfeiture rule in the manner proposed by the state is really a "murder charge exception" that undermines the presumption of innocence of defendants in murder cases and deprives them of their rights to confrontation and a fair trial. In these most serious of cases, it is essential that these rights be protected to prevent wrongful convictions.

The state does not argue that Jensen caused his wife's unavailability for the purpose of keeping her from testifying and there is no evidence that Mark Jensen acted for the purpose of preventing Julie from being a witness. Judge Schroeder's finding on this point certainly was not clearly erroneous. Because the doctrine of forfeiture by wrongdoing, in its broadest application, only applies where the defendant acted to prevent the declarant from testifying as a witness, the doctrine has no application here. Accordingly, no hearing is necessary.

B. If the Court Requires a Hearing on Forfeiture, the State's Burden Must be by Clear and Convincing Evidence.

If this Court accepts the state's position, then Jensen agrees that the trial court should decide the forfeiture by wrongdoing issue outside the jury's presence. The

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[12](...continued)
there was enough left to test the liquor for poison, insisting that the smell and taste were strange. Mrs. Shepard then added, "Dr. Shepard has poisoned me." The Court rejected the government's contentions that Mrs. Shepard's statement was admissible as a dying declaration or as evidence of Mrs. Shepard's state of mind and reversed the murder conviction. No consideration was given to the forfeiture by wrongdoing doctrine.

state's burden to establish forfeiture should be by clear and convincing evidence. The state correctly notes there is a split in authority on this issue.

In *Thevis*, 665 F.2d at 633 n. 17, for example, the clear and convincing evidence standard was used.[13] Other cases also have used this standard. *E.g., People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995); *see also King v. Superior Court*, 32 Cal. Rptr. 2d 585, 600 (Cal. App. 2003) (requiring proof by clear and convincing evidence to support finding of forfeiture of right to counsel by misconduct). Friedman's view is that "given the importance of the confrontation right, the court should not hold that the accused has forfeited it unless the court is persuaded to a rather high degree of probability that the accused has rendered the declarant unavailable . . . ." *Definition of Chutzpa*, at 519.

Although a number of federal courts have applied the preponderance of evidence standard, the higher standard of clear and convincing evidence should prevail in light of the magnitude of what is at stake. The penalty the state seeks to exact from Jensen, in a murder case, is to strip him of his constitutional right of confrontation. That might seem reasonable enough if one assumes Jensen's guilty, but he is innocent, in actuality and as presumed under our constitution. No doubt the preponderance standard used under Wis. Stat. (Rule) 901.04 for determining preliminary questions of the admissibility of evidence works efficiently for the

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[13] The state asserts that *Thevis* is no longer good law. State's Brief at 35. The state is wrong as *Thevis*, a Fifth Circuit case, never has been overruled in that circuit.

multitude of decisions a court must make during the heat of trial, but given the severity of a finding against Jensen, a more searching standard is appropriate. *Cf. Johnson v. Zobst*, 304 U.S. 458, 464 (1938) ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights") (citation omitted).

The Court should consider that if forfeiture is applied, then unreliable evidence may be admitted against Jensen because a finding of forfeiture does not establish or in anyway suggest the reliability of the evidence. The admission of unreliable evidence obviously increases the likelihood of conviction, but not the accuracy of the result. Before harming the defendant in such a fashion, more ought to be required of the state than simply proving Jensen's wrongdoing by a preponderance of the evidence. At the very least, the court forfeiting the accused's constitutional rights ought to be firmly convinced, by clear and convincing evidence, if not beyond a reasonable doubt, that the defendant committed the conduct. Otherwise, the forfeiture doctrine will open the floodgates to unreliable, untested hearsay evidence in virtually every murder case.

As the Court emphasized in *Geraci*:

> Because human fact finders lack the quality of omniscience, the process of determining the truth in adjudicative proceedings necessarily involves some margin of error... The size of the margin of error that the law is willing to tolerate varies in inverse proportion to the importance to the party or to society of the issue to be resolved.... On the other end are criminal determinations of guilt or innocence "[w]here one party has at stake an

> interest of transcendent value" (*Speiser v. Randall*, 357 U.S. 513, 525). The rules governing how persuasive the proof must be "[represent] an attempt to instruct the fact finder concerning the degree of confidence our society thinks...should [be had] in the correctness of factual conclusions for a particular type of adjudication" (*In re: Winship*, 397 U.S. 358 [Harlan, J., concurring]). Viewing the issue in light of this fundamental principle, we deem the "clear and convincing evidence" standard to be the test that best recognizes the gravity of the interest at stake and most effectively balances the need to reduce the risk of error against the practical difficulties of proving witness tampering.

649 N.E. 2d at 821-22.

The state makes a one-sentence argument on pages 38-39 of its brief that pursuant to *State v. Whitaker*, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992), the trial court should consider Mrs. Jensen's testimonial statements in determining whether the forfeiture rule applies. *Whitaker* permits the hearsay declarations of alleged co-conspirators to be considered by the trial court in determining the existence of a conspiracy, the foundation upon which admission of those hearsay statements at trial depends. *But see State v. Ray,* 166 Wis. 2d 855, 481 N.W.2d 288 (Ct. App. 1992)(must make *prima facie* showing of conspiracy independent of disputed statement). *Whitaker* has not been cited as authority in any court for the point on which the state's argument rests, and it certainly is not applicable in this case in which there are no co-conspirator statements. *Whitaker* does not suggest a blanket rule that every hearsay statement is admissible at every hearing to determine whether a

foundation exists for the admission of that hearsay at trial. Such a broad reading of *Whitaker* is unsupported and should not be adopted by this Court.

If the court adopts the broad forfeiture by wrongdoing exception proposed by the state, the scope of that exception should be limited to evidence otherwise admissible under the hearsay rules. *See People v. Giles*, 19 Cal. Rptr. 3d 843, 850 (Cal. App. 2d 2004) ("forfeiture by wrongdoing does not automatically render hearsay statements...admissible," as "prior statements by an unavailable witness must still fall within a recognized hearsay exception").[14] The hearsay rules are designed to ensure the reliability of evidence. The admission of evidence that does not even satisfy the hearsay rules on the basis of forfeiture poses an intolerable risk that the verdict will be based on unreliable evidence. Historically, even where forfeiture applied, as in *Reynolds*, the reliability of the statement still had been tested by the defendant's prior opportunity to cross-examine. Further, unlike the federal rules of evidence and the rules of other states, Wisconsin's rules of evidence do not contain a forfeiture by wrongdoing provision that allows the presentation of hearsay not satisfying one of the identified exceptions.

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[14] *Giles*, which is cited in the state's brief at 18-19, 23, 27, is not just unpublished as acknowledged by the state, but also has been superseded. The California Supreme Court has granted review, 22 Cal. Rptr. 3d 548 (2004).

CONCLUSION

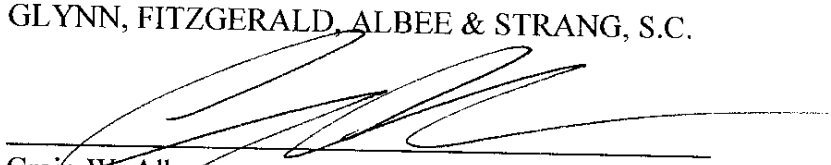
For the reasons stated above, this Court should affirm Judge Schroeder's order excluding Mrs. Jensen's statements to police because they are testimonial and therefore would violate *Crawford*. The Court also should affirm Judge Schroeder's order holding that the forfeiture by wrongdoing doctrine does not apply where the defendant has not caused the declarant's absence for the purpose of preventing her from testifying.

Dated at Milwaukee, Wisconsin this 4th day of November, 2005.

Respectfully submitted,

MARK JENSEN, Defendant-Respondent-Cross-Appellant

GLYNN, FITZGERALD, ALBEE & STRANG, S.C.



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RULE 809.19(8)(d) CERTIFICATION

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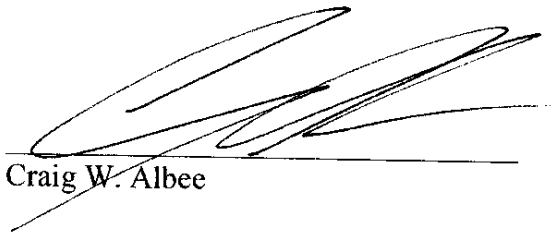

Craig W. Albee

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 04-2481-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

MARK D. JENSEN,

Defendant-Respondent-Cross-Appellant.

BRIEF OF CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Cites

STATEMENT OF ISSUES

1. Did the trial court err in holding that Julie Jensen's statements to her neighbors, Mr. and Mrs. Wojt, and her son's teacher, Therese DeFazio, were not testimonial under *Crawford* and therefore admissible at trial?

The trial court found that the statements were not testimonial and therefore not barred at trial by *Crawford.*

2. If this Court finds that the statements to the Wojt's and Ms. DeFazio are testimonial, is the state entitled to a pretrial hearing on whether the statements may be admitted under the doctrine of forfeiture by wrongdoing?

The trial court concluded that the doctrine of forfeiture of wrongdoing is inapplicable under the circumstances of this case.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 04-2481-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

MARK D. JENSEN,

Defendant-Respondent-Cross-Appellant.

BRIEF OF CROSS-APPELLANT

STATEMENT OF THE CASE

After the state filed its notice of appeal (R98), Jensen filed a notice of cross-appeal on October 18, 2004, relating to that portion of Judge Schroeder's order admitting Julie Jensen's statements to her neighbors, the Wojts, and to her son's teacher, Theresa DeFazio, over Jensen's confrontation challenge (R97:1-2 A-Ap. 101-102; R110:2-4; A-Ap. 108-110). On December 30, 2004, the state moved to dismiss Jensen's cross-appeal claiming that he was not in compliance with Wis. Stat.

§809.50 governing interlocutory appeals. On January 13, 2005, Jensen filed a response to that motion asserting that he had properly filed his notice of cross-appeal under Wis. Stats. §809.10. By order dated January 27, 2005, the court of appeals denied the state's motion to dismiss the cross-appeal. The cross-appeal is before the Court pursuant to the Court's order granting the state's petition to bypass.

STATEMENT OF FACTS

Jensen relies on the statements of facts contained in the state's appeal brief and Jensen's response brief. This statement of facts briefly supplements those statements of facts.

The state has identified a number of statements that Mrs. Jensen allegedly made to Mr. Wojt that it intends to introduce at trial (R30). The thrust of these statements is summarized in the criminal complaint (R1:2):

> [A]bout two weeks before Julie's death, Julie told us that something was going to happen. She suspected Mark was trying to poison her. Julie stated Mark would offer her some drink and Julie would not drink it because she thought it was poison...Julie gave me an envelope with my name on it. Julie asked that if anything happened to her, to give the envelope to the police. I did not know what was in the envelope when I handed over the envelope to the police after Julie died...On the weekend before her death, the Sunday before, I saw Julie, and she stated to me that she was afraid that Mark was putting poison in her food or drink and she did not eat all weekend. Julie was shaking and crying. She was in bad shape...Julie also stated Mark would call

> up things on the Internet about poisoning on the Internet, and he would leave it on the screen for her to see. Some of the things were undetected poisoning that was on the computer.

At the motion hearing on the admissibility of Mrs. Jensen's statements to the Wojts and Ms. DeFazio, the trial court used the factual summary in the state's supporting memorandum as an offer of proof concerning the statements the state intended to introduce at trial (R30:3-11; D-App 2-10). That portion of the state's memorandum is attached as an appendix. *Id.*

The criminal complaint also summarizes the statements of Therese DeFazio, a teacher for one of the Jensens' sons:

> When I coaxed her, she told me how she was afraid her husband was going to kill her last weekend. When I asked her why she thought such a serious thing was going to happen, she explained why. She had found a paper listing things to buy in her husband's stuff. She said it listed syringes and names of drugs on it. Then she said that she thought he might try to kill her with a drug overdose and make it look like a suicide. I asked her why she thought he would do this. She said that there were other things she couldn't explain. She also wondered aloud if the drugs were for himself, but she didn't ever see him taking drugs so she didn't think that was the reason for the list...one other time she had mentioned that it bothered her how every time she walked into the room when her husband was on the computer, he always turned it off or covered

> it quickly. She asked him why once, but he said he was doing business stuff, and he was done.

R1:2; *see also* R30:7-9; D-App 7-9.

According to Mrs. Wojt, she had several conversations with Mrs. Jensen in the weeks before her death. Mrs. Jensen told Mrs. Wojt that she was unhappy that her youngest son would be going to daycare and that her husband wanted her to get a job outside the house (R30:10; D-App 9). On another occasion, Mrs. Jensen panicked and expressed concern when Mr. Jensen came home early because she thought that he would think she was up to something by being at the Wojts (R30:9; D-App 8).

Judge Schroeder concluded that Mrs. Jensen's statements to the Wojts and Ms. DeFazio are not testimonial. The court found that while Mrs. Jensen's comments to these witnesses "could be viewed as remarks which were intended for the ears of police," and "could in fact have been motivated by these purposes," they "would also be wholly consistent with 'a casual remark made to an acquaintance' by a person alarmed by an anticipated, and terrifying danger." (R97:2; A-Ap. 102). The court determined that under these circumstances the statements are not testimonial because: (1) *Crawford* did not adopt the argument that "testimonial statements" include "statements that were made in circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," and (2) the circuit court would have to embrace the defense theory rather than the

state theory regarding Mrs. Jensen's motives, and the court believed the state's theory also was plausible (R97:2; A-Ap. 102).

ARGUMENT

I. Mrs. Jensen's Statements to the Wojts and Ms. DeFazio are Testimonial and Therefore Inadmissible Under *Crawford*

A. Standard of Review

Whether the admission of evidence violates the defendant's right to confrontation is a question of law subject to independent appellate review. *State v. Hale*, 2005 WI 7, ¶41, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637. For purposes of that review, the appellate court must accept the circuit court's findings of fact unless they are clearly erroneous. *State v. Jackson*, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998).

B. Mrs. Jensen's Accusatory Statements to the Wojts and DeFazio are Testimonial.

1. Mrs. Jensen's Statements Perform the Function of Testimony.

As discussed in Jensen's Response Brief at 6-10, a statement satisfying the third *Crawford* formulation is testimonial. Thus, as the court stated in *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005), for example, "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." Mrs. Jensen's statements to her neighbors, the Wojts, and to her son's

teacher, Ms. DeFazio, satisfy that third *Crawford* formulation. However, it also should be recognized that some statements not falling within any of the three *Crawford* formulations must be considered testimonial.

Crawford did not hold, nor suggest, that testimonial statements are restricted to the categories specifically identified in the Court's opinion. *See* Jensen's Response Brief at 8-9. The Court's comment that "whatever else the term [testimonial] covers," 541 U.S. at 68, strongly indicates that "testimonial" encompasses statements falling outside the three "core" categories identified in *Crawford*. Similarly, this Court's comment in *Manuel*, that "[f]or now, at a minimum," statements falling within any of the three formulations identified in *Crawford* are testimonial, also suggests that statements outside these formulations may be testimonial. 2005 WI 75, ¶39.

The essence of the confrontation right is that the defendant be allowed to face his accuser(s). The Sixth Amendment's command is that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." An appropriate initial question then is: "Who is accusing the defendant?" *See Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (emphasis added) ("[A]n out-of-court *accusation* is universally conceded to be constitutionally inadmissible against the accused"). Professor Friedman cautions against "relying on a pre-determined checklist of characteristics" in favor of making "the determination of whether a

statement is testimonial depend on whether it performs the function of testimony." R. Friedman, *Grappling with the Meaning of "Testimonial,"* Draft Paper, available at http://www-personal.umich.edu/%7Erdfrdman/Grappling1.pdf. [hereinafter Friedman, *Meaning of Testimonial*] at 3-4. Any definition of testimonial ought to ensure the defendant's right to cross-examine any witness whose accusatory statements the state intends to introduce against the defendant. Unfortunately, it is likely that none of the proposed *Crawford* formulations fully encapsulates all evidence that is testimonial. *Crawford* even referred to the three formulations of "testimonial," as describing the "core class" of testimonial statements, not the entire universe.

In *In re E.H.*, 823 N.E.2d 1029 (Ill. App. Ct. 2005), *appeal allowed*, 833 N.E.2d 2 (2005), the court applied a test arguably broader than any of the three *Crawford* formulations, but consistent with the third formulation. There, the court held that a child's statements to her grandmother accusing a juvenile of sexual assault were testimonial. The court recognized that *Crawford* holds that the Confrontation Clause applies "'against those who bear testimony.'" Because the child, B.R., "bore accusatory testimony" against the accused, E.H., which was offered to prove that E.H. sexually assaulted her, the statement to the grandmother was testimonial. The court explained:

> In this case B.R. never actually made a statement to a "governmental official" as contemplated in

> *Crawford*. However, we believe that this fact alone does not remove this case from the scrutiny of the confrontation clause and whether it has been violated. In a footnote, the *Crawford* Court reiterates that "*when the declarant appears for cross-examination at trial*, the confrontation clause places no constraints at all on the use of his prior testimonial statements," and that "[t]he Clause does not bar admission of [the] statement *so long as the declarant is present at trial to defense or explain it.*" (emphasis added). *Crawford*, 541 U.S. at - - - n. 9, 124 S.Ct. at 1369 n. 9, 158 L.Ed.2d at 197 n.9. In this case, the declarant, B.R., did not appear for cross-examination at trial and was not present at trial to defend or explain her accusations against the defendant. B.R. made an out-of-court statement to her grandmother, which was offered to prove the matter asserted, and the grandmother testified to that out-of-court statement in court. The admission of the accuser's out-of-court statement testimony by permitting another witness, the grandmother, to testify for the accuser, is exactly what the Framers of the Constitution were endeavoring to prohibit with the sixth amendment. *See* U.S. Const., amend VI. Therefore, E.H. had a constitutional right to confront her accuser.

823 N.E.2d at 1036.

E.H. relied on an earlier case, *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004), for the proposition that "[w]hen the content of the victim's statement concerned fault or identity, then such testimonial statements were only admissible if the declarant testified at trial and was subject to cross-examination." *Id.* This principle is a worthy

complement to the third *Crawford* formulation of testimonial and should be applied in conjunction with it.

2. The Trial Court Erred in Concluding that Mrs. Jensen's Statements to the Wojts and DeFazio are Not Testimonial

The state undoubtedly will argue that the absence of law enforcement involvement renders Mrs. Jensen's statements to the Wojts and Ms. DeFazio non-testimonial. The context and circumstances of the statements, however, demonstrate that they are testimonial in nature and that the trial court erred in finding them admissible.

Crawford does not hold that statements made outside of a judicial setting or to law enforcement officers are not testimonial. While "testimonial statements" presumably do not include casual remarks to acquaintances, *see Crawford*, 541 U.S. at 51-52, statements to friends, family and others that are made under circumstances where the declarant would reasonably expect that the statement would serve as evidence ought to be considered testimonial. *See, e.g.*, R. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1040-1043 (1998); Friedman, *Meaning of Testimonial* at 10 ("If the declarant anticipates that the statement, or the information asserted in it, will be conveyed to the authorities and used in prosecution, then it is testimonial, whether it is made directly to the authorities or not"). By their

nature, hostile accusations that are not made in confidence are statements that a reasonable person would realize may later serve as evidence.

Mrs. Jensen's statements to the Wojts and DeFazio were intended to be used as evidence against Mr. Jensen in the event she died. She reasonably expected that the statements would be used prosecutorially if something happened to her. As demonstrated by her refusal to accept any assistance from the Wojts, Officer Kosman, or DeFazio, she did not make the statements so that others could intervene to protect her. The statements were calculated to be used at a later time. As in *In re E.H.*, Mrs. Jensen's accusations make her as much a witness in this trial as anyone who will take the stand at trial.

Mrs. Jensen's statements are testimonial because they satisfy the third *Crawford* formulation of testimonial statements. *See generally* Jensen's Response Brief at 6-23. With great ceremony, Mrs. Jensen accused Mark of undertaking illegal activities and she described those activities to the Wojts and Ms. DeFazio. She anticipated that her friends would repeat her statements to the police in the future. Accordingly, she was "bearing witness" against Mr. Jensen and therefore her statements must be considered testimonial.

Jensen cannot say that the trial court's factual findings were "clearly erroneous." Judge Schroeder recognized that "Mrs. Jensen's statements to the Wojts and Ms. DeFazio, could be viewed as remarks which were intended for the ears of

the police, when viewed in conjunction with the conversations which she had with Officer Kosman." (R97:2; A-Ap. 102). The court further found that "[c]ertainly Mrs. Jensen's comments to others could, in fact, have been motivated by these purposes, but they could also have been driven by many other considerations, including the sentiments which the state contends she held." *Id.* However, the court also found that "[w]hile her remarks could have been part of a complex design to ensnare the defendant in a charge of uxorcide following her own intended suicide, they also would be wholly consistent with 'a casual remark make to an acquaintance' by a person alarmed by an anticipated, and terrifying danger." *Id.* Thus, the court apparently concluded that Mrs. Jensen's motivations for making her statements to the Wojts and Ms. DeFazio were unclear and could support either the prosecutor's theory or the defense theory.

The trial court's factual findings require this Court to find the statements to the Wojts and Ms. DeFazio inadmissible for two reasons. First, the burden is on the state to prove that the defendant's statements were not testimonial. In *People v. Cortes*, 4 Misc.3d 575, 781 N.Y.S.2d 401 (2004), the court held that a pretrial statement is testimonial "if the circumstances would lead a reasonable person to realize that the statement is likely to be used in investigation or prosecution of a crime." *Cortes* places the burden on the state of demonstrating that the pretrial statement "*was made primarily for another purpose*" than for use in investigation or

prosecution of a crime. The court found this test "more in accord with the highly prized protection of the right of confrontation." *Id.* at 594. Applying this test, *Cortes* found 911 calls to be testimonial. As Professor Friedman has pointed out with respect to 911 calls, "the more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial." R. Friedman and B. McCormack, *Dial-In Testimony,* 150 U. Pa. L. Rev. 1171, 1242-1243 (2002) (footnotes omitted). *See also State v. Powers*, 124 Wash.App. 92, 99 P.3d 1262 (2004) (relying on Friedman and *Cortes* to conclude that 911 call at issue was testimonial because the content of the call was to report a crime and not to call for help).

As *Cortes* emphasizes, statements often may have multiple anticipated uses. There is no requirement that the statement be exclusively intended for use in an investigation or prosecution. *See also State v. Snowden*, 867 A.2d 314, 330 (2005) (holding that "[n]o matter what other motives exist," a statement is testimonial if made under circumstances that would cause an objective person to believe the statement would be used at trial).

Especially given the lack of opportunity to cross-examine the declarant, it is extremely difficult for the defendant to prove the declarant's precise motivations. Further, placing the burden on the state to show that the declarant's statements are not testimonial is consistent with our justice system's strong preference for face-to-

face confrontation. It also is consistent with the practice under *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), of requiring the state to establish the admissibility of out-of-court statements under the Confrontation Clause.

Second, the trial court applied an erroneous definition of "testimonial." Although the trial court did not clearly identify the standard by which it determined that Mrs. Jensen's statements to the Wojt's and DeFazio were not testimonial, the trial court did say it was rejecting the defense position that testimonial statements include any "'statements that were made in circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" because *Crawford* had not adopted that argument (R98:2; A-Ap. 102). *State v. Manuel*, 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811, has now adopted the definition of "testimonial" that Judge Schroeder refused to apply. As a result, Judge Schroeder also did not consider whether an objective witness in Mrs. Jensen's position reasonably would have believed the statements might be used to investigate or prosecute her husband.

The trial court's legal errors constitute a misuse of discretion. *See Pinczkowski v. Milwaukee County*, 2004 WI App 171, ¶13, 276 Wis. 2d 520, 687 N.W.2d 791 ("if the trial court bases its exercise of discretion on an error of law, that constitutes a misuse of discretion"). Accordingly, this Court should reverse the trial court and find the statement inadmissible based on the court's factual findings

determining that Mrs. Jensen's statements to others may have been intended for police.

II. The Forfeiture by Wrongdoing Doctrine is Inapplicable

Judge Schroeder correctly held that the forfeiture by wrongdoing doctrine does not apply in this case because the state cannot show that Jensen acted with the purpose of preventing his wife from testifying. For the same reasons set forth in Jensen's Response Brief at 24-40, this Court should affirm that order.

CONCLUSION

For the reasons stated, this Court should reverse the trial court and hold that Mrs. Jensen's statements to the Wojts and Ms. DeFazio are testimonial and therefore inadmissible.

Dated at Milwaukee, Wisconsin this 4th day of November, 2005.

Respectfully submitted,

MARK JENSEN, Defendant-Respondent-Cross-Appellant

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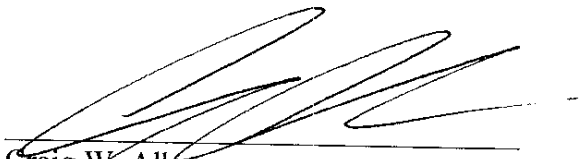

Craig W. Albee

STATE OF WISCONSIN

IN SUPREME COURT

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STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

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APPENDIX OF CROSS-APPELLANT

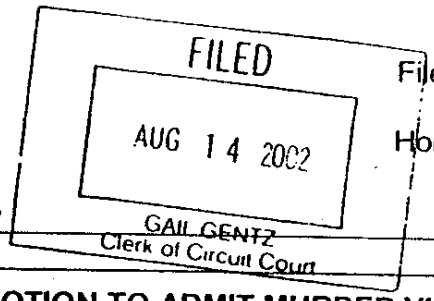
Record No	**Description**	**D-App No**
R30:1, 3-11	State's Brief in Support of Motion to Admit Murder Victim's Statements	1-10

State of Wisconsin | Circuit Court | Kenosha County

STATE OF WISCONSIN
Plaintiff,

-VS-

Mark D Jensen
Defendant,



File No. 2002CF000314

Hon. Bruce Schroeder

BRIEF IN SUPPORT OF MOTION TO ADMIT MURDER VICTIM'S STATEMENTS

STATEMENT OF FACTS

(1) Week of November 9, 1998

The week of November 9, 1998, approximately three weeks prior to Julie Jensen's murder, Tadeusz Wojt returned home from work one day to find his neighbor of seven years, Julie Jensen, head down, sobbing on her front porch. Mr. Wojt lived with his wife, Malgorzata Wojt and their children next door to Julie Jensen, her husband (the defendant) and their two children, David and Douglas. Mr. Wojt approached Julie Jensen and questioned her welfare. Still sobbing, Julie Jensen told Mr. Wojt that she was upset because her marriage was in trouble. She stated that things had never been so bad between herself and her husband, Mark Jensen, the defendant, and they always argued about everything.

Julie Jensen stated that she suspected the defendant was having an affair and that they had even cancelled a planned trip together as their marriage was just not working. She also stated that the defendant was pressuring her to get a job and to put the children in school and/or daycare all day. She stated that she would like to get a divorce but that the defendant would never let her take the kids, and she would never leave her two sons.

(2) November 21, 1998

Julie Jensen spoke to her neighbor, Mr. Wojt, and was crying and shaking, stating that the defendant was going to poison her. Julie Jensen stated that she had found two syringes in an open drawer and that the defendant had looked up something on the computer having to do with poison. Julie Jensen said that the defendant would look things up on the computer and leave it up on the computer screen, then leave the door open or do something so she would see it. Julie Jensen further found some of the notes that the

defendant had written in his planner, which she said had to do with poison. She appeared to be very upset. Mr. Wojt suggested that she leave the defendant and offered her some assistance. Mr. Wojt told Julie Jensen that she should leave and told her that she could stay at their cottage or their place in Chicago. Mr. Wojt offered her some money and told her to call police.

(3) The morning of November 22, 1998

Julie Jensen again spoke to Mr. Wojt, relating what had happened the previous night. She told Mr. Wojt that the defendant would offer her something to drink but she would not drink it. She stated the defendant would then actually follow her around with the drink, still trying to get her to drink. Julie Jensen stated that the defendant offered her food also; but she would not eat. When she refused, the defendant would continue to pressure her and become angry that she refused the drink and food.

She said that the defendant had brought a bottle of wine to bed and had poured a glass for her. Julie Jensen stated that she put the glass to her lips and put it down, without drinking. Julie Jensen told Mr. Wojt that she was scared to death that the defendant was trying to poison her. The defendant was insisting that she drink more, and Julie Jensen believed that the defendant was trying to get her to fall asleep so that he could inject her with something as she slept. Julie Jensen was so scared that she did not drink, and then she and the defendant got into an argument about her not drinking the wine. Julie Jensen did not go to sleep that evening. Mr. Wojt stated that she was extremely pale, crying and shaking. Julie Jensen told Mr. Wojt that she had called the police but they were not available. She further stated that she did not think that she was going to live throughout the weekend.

[redacted]

(4) The afternoon of November 22, 1998

Later that day, Julie Jensen again approached Mr. Wojt and slipped an envelope in his pocket with instructions to give the envelope to police if anything happened to her. The envelope had the name "Ted Wojt" written on the outside. Julie Jensen also gave Mr. Wojt an undeveloped roll of film. She explained that she took some photographs of things that the defendant would look up or note, which she believed referenced poisoning. Mr. Wojt took the envelope addressed to him and placed it in his home but did not open the envelope.

(5) November 24, 1998 – Officer Kosman

Julie Jensen spoke with Police Officer Ron Kosman about concerns she had of the defendant. Officer Kosman stated he was acquainted with Julie Jensen because of some suspicious circumstances and harassment involving the defendant where pornographic pictures were left on the defendant's car and around the residence usually found by the defendant first. On this particular date, Julie Jensen left a voicemail message for Officer Kosman indicating that the defendant had been acting very strange lately and leaving himself notes that she had photographed. In her voicemail message, she stated she was not sure what to think of the defendant's behavior but wanted to speak with Officer Kosman in person because she was afraid that the defendant was recording her phone conversations.

(6) November 24, 1998 – Conversation with Wojts

Julie Jensen asked the Wojts for the film back as she was giving the film to the police. Mr. Wojt retained possession of the unopened letter.

[redacted]

(7) November 24, 1998 – Second Conversation with Officer Kosman

Officer Kosman stopped by Julie Jensen's residence. Julie Jensen told Officer Kosman that the defendant had been acting very strange and is very secretive, spending a lot of time on the computer, and complaining that Julie Jensen was not romantic enough. Julie Jenson told Officer Kosman that the defendant was spending a lot of time on the computer, and if she would look in, the defendant would attempt to cover up the screen. Julie Jensen said she normally goes to bed early but her husband usually stayed up late in the computer room. Julie Jensen also indicated that her husband did do some of his work on the computer.

Julie Jensen also told Officer Kosman that the prior incidents involving the pornographic pictures have stopped since the defendant started a new officer manager job in Racine. Julie Jensen indicated that the defendant still had the pornographic pictures that he kept in the garage with his pornographic movies. Julie Jensen stated that the defendant would sometimes stay out late drinking with some of the guys from work. She also indicated that there were times she would look in the computer room and noticed that the defendant had been leaving notes written on the calendar. Julie Jensen stated that some of these things concerned her and that one note contained a list of items such as "aspirin, razor blades and syringe." She stated that this was not a shopping list or anything that either she or the defendant would use, and she was concerned about the defendant's behavior and the notes that were written. Julie Jensen told Officer Kosman that she was afraid to confront the defendant about the notes and stated that she could not take them. Julie Jensen photographed the notes and gave the film to the next-door neighbor, later

giving the film to Officer Kosman. Julie Jensen told Officer Kosman that she thought the defendant was writing the notes like it was a suicide for her.

Julie Jensen told Officer Kosman that the defendant has not made any mention of harming himself or anyone else and preferred that Officer Kosman take no further action at the present time. She also stated to Officer Kosman that if something should happen to her and notes were left, it was not a suicide.

(8) November 25, 1998

Julie Jensen went in to assist Theresa DeFazio. Ms. DeFazio was David's teacher, and Julie Jensen was a volunteer parent in the classroom every Wednesday. Ms. DeFazio inquired about the defendant's reception to the conference that had been held on November 18, 1998. At that conference, Ms. DeFazio had expressed concern to Julie Jensen and the defendant about David's eye ticks and twitching. Julie Jensen told Ms. DeFazio that the defendant was unusually quiet but gave her permission to call the doctor and make any necessary appointments for David. The defendant hardly spoke to her anymore that evening. Julie Jensen began telling Ms. DeFazio more but hesitated for a moment. After Ms. DeFazio inquired of Julie Jensen what was the matter, she told Ms. DeFazio that she was not sure if she should tell her any more. Julie Jensen eventually told her how afraid she was that the defendant was going to kill her last weekend. Ms. DeFazio inquired of Julie Jensen why she would think such a serious thing. Julie Jensen explained to Ms. DeFazio that she had found in her husband's belongings a paper listing things to buy, which included syringes and names of drugs on it. Julie Jensen then told Ms. DeFazio her concerns that the defendant would try to kill her with a drug overdose and make it look like a suicide. Ms. DeFazio asked Julie Jensen wny she thought the

defendant would do this, and Julie Jensen stated there were other things she could not explain.

Also, in this conversation with Ms. DeFazio, Julie Jensen wondered aloud if the defendant intended the drugs for himself. However, Julie Jensen also recalled she had never seen the defendant take drugs so she did not think that was the reason for the list. Ms. DeFazio asked Julie Jensen if she had called the police, and Julie Jensen told her that she told this to a male police friend of hers. Julie Jensen also told Ms. DeFazio that she had given the list she had found to a neighbor she trusted and told the neighbor to keep it in a safe place in case something happened to her. Julie Jensen also told the neighbor not to tell anyone. Ms. DeFazio stated that Julie Jensen also talked with her sister-in-law about these fears.

On a different occasion, Julie Jensen mentioned to Ms. DeFazio that she was bothered how every time she walked into the room when the defendant was on the computer, the defendant always turned it off or covered it quickly. Julie Jensen asked the defendant why he did this one time but the defendant told her that he was doing business and was done.

Ms. DeFazio knew that Julie Jensen was very afraid of the defendant and described him as very controlling. Julie Jensen wrote Ms. DeFazio a note saying that she came to help Ms. DeFazio but Ms. DeFazio was actually helping her. Julie Jensen also told Ms. DeFazio that she was afraid that she had told her too much. Julie Jensen told Ms. DeFazio that she was thinking of getting a part-time job while her son Doug was in pre-school but she was not sure if the defendant would allow it. Julie Jensen stayed with the defendant for the sake of their children whom she loved dearly; and thought if she would

try to leave the defendant, he would make up stories that she was unstable so he would get the children. Julie Jensen did not want to lose her children.

(9) November 24 through November 28, 1998

Julie Jensen spoke to Mr. Wojt and again stated that she did not eat or drink. Mr. Wojt stated that Julie Jensen stated the same fears that she had previously iterated but that she seemed even more scared. She was surprised that she had survived the weekend. Mr. Wojt again spoke to Julie Jensen and suggested that she leave the defendant and again offered her some assistance.

(10) November 29, 1998

On November 29, 1998, Ms. Wojt saw Julie Jensen, the defendant, Douglas and their dog going for a walk after lunch. When they came back from the walk, the defendant and Douglas went to the store to pick something up. Julie Jensen then went over to Ms. Wojt's house and made a phone call to Officer Kosman but Officer Kosman was not there. Ms. Wojt asked Julie Jensen if everything was better because it looked like it was, since they went for a walk together. The defendant came home earlier than Julie Jensen thought he would, and she panicked. Julie Jensen grabbed a magazine because she was afraid that the defendant would think she was up to something. Julie Jensen told Ms. Wojt that Ms. Wojt had to go back to her house with her so it would look like they were each borrowing something from each other. Ms. Wojt then walked with Julie Jensen to Julie Jensen's house to get something from her so the defendant would not be suspicious.

(11) December 1, 1998 – Dr. Borman

On December 1, 1998, Julie Jensen went to see her family doctor, Dr. Borman. Dr. Borman treated Julie Jensen, the defendant and their two children. Julie Jensen told Dr.

[redacted]

Borman that she was there to discuss a personal problem. Dr. Borman stated that Julie Jensen complained about being miserable, depressed and had a decreased appetite. Julie Jensen said she had some marital problems but denied any domestic violence. Dr. Borman stated that Julie Jensen was in tears and appeared to be distraught. Julie Jensen denied being suicidal or homicidal.

(12) December 1, 1998– Malgorzata Wojt

Ms. Wojt spoke to Julie Jensen in the afternoon, sometime before 3:00 p.m. Julie Jensen had just pulled up in her driveway and was unloading her car of bags, probably groceries. Julie Jensen was not happy because Douglas had just started going to day care for the full day. Up until that Monday or Tuesday, Douglas would only go to day care for half of a day. The defendant wanted Douglas to go to day care for the entire day and wanted Julie Jensen to get a job outside of the home. Ms. Wojt knew that Julie Jensen had applied for jobs, and Ms. Wojt asked her if she had heard back from any of the jobs. Julie Jensen said no. Julie Jensen also talked about the fact that she had a doctor's appointment that she went to that day.

(13) December 2, 1998 – Malgorzata Wojt

Around 10:00 a.m., Ms. Wojt spoke to Julie Jensen over the phone. Julie Jensen said she called because Mr. and Mrs. Wojt "might worry because they were not going to see her outside." Ms. Woit asked Julie Jensen if she was okay after Ms. Wojt heard her voice, and Julie Jensen said, "Whoa, this medicine that I took; I didn't know it would have this effect." Ms. Wojt offered to help Julie Jensen, and Julie Jensen said that the defendant was taking care of the kids and taking them to school. Julie Jensen also said that the defendant was taking care of her and that the defendant was "being good to her."

Ms. Wojt stated that she kept asking if she could help, because Julie Jensen's voice didn't sound right. Julie Jensen repeatedly told Ms. Wojt no, the defendant was taking care of everything. Julie Jensen said the defendant was going to the doctor for her.

(14) December 2, 1998 – Conversation with Theresa De Fazio

Julie Jensen sent a note to Ms. DeFazio stating that David had permission to go to his friend Eric Schoor's house but that she would not be able to assist Ms. DeFazio in the classroom this day because she was sick.

(15) December 4, 1998

Detective Sergeant Ratzburg spoke to the Wojts, and Mr. Wojt gave Detective Sergeant Ratzburg the envelope that Julie Jensen had given Mr. Wojt. Mr. Wojt explained to Detective Sergeant Ratzburg that Julie Jensen had instructed him, in the event of her death, to give the letter to the police. Detective Sergeant Ratzburg took the envelope but did not open it immediately and continued to speak with the Wojts. Later that day, Detective Sergeant Ratzburg opened the envelope addressed to Ted Wojt and given to him by Mr. Wojt and found the letter.

Detective Sergeant Ratzburg sent the letter to the Wisconsin State Crime Laboratory in Milwaukee, Wisconsin, where it was analyzed by Jane A. Lewis in the Questioned Documents Department. After analyzing other known writings from Julie Jensen visually, microscopically and instrumentally, Ms. Lewis determined that the writer of the letter was Julie Jensen.

ARGUMENT

The Sixth Amendment confrontation clause literally provides that:

> In all criminal prosecutions, the accused shall enjoy the right to...be confronted with the witnesses against him.

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Reply

COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT

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STATE OF WISCONSIN

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REPLY BRIEF OF PLAINTIFF-APPELLANT

ARGUMENT

I. JULIE JENSEN'S LETTER AND VOICEMAIL TO POLICE ARE NONTESTIMONIAL UNDER *CRAWFORD*.

A. Two pending Supreme Court cases will further define "testimonial" and could conceivably resolve one of the issues raised herein.

The United States Supreme Court will provide desperately needed guidance for determining whether a

statement is testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), when it decides two cases recently accepted for review: *Davis v. Washington*, No. 05-5224, and *Hammon v. Indiana*, No. 05-5705. *Davis* and *Hammon* are domestic violence cases that raise confrontation issues involving the hearsay exception for excited utterances.

In *Davis*, the Washington Supreme Court found it necessary to examine the circumstances of a 911 call to determine whether statements made during the call are testimonial. *State v. Davis*, 111 P.3d 844, 850 (Wash. 2005). Finding that the victim had called 911 because of an immediate danger and not to assist police in an investigation, the court decided that her statements describing the alleged crime and naming Davis as her assailant were nontestimonial, although made in response to questioning. *Id.* at 846, 851.

In *Hammon*, the Indiana Supreme Court held that the victim's oral statements to an officer responding to a domestic violence call were not testimonial because "the initial exchange . . . fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what." *Hammon v. State*, 829 N.E.2d 444, 458 (Ind. 2005). However, the court held that the victim's subsequent affidavit reciting virtually the same statements was testimonial under *Crawford*. *See id.*

Presumably, the Supreme Court in deciding *Davis* and *Hammon* will resolve the widespread disagreement among the nation's courts regarding whether excited utterances that describe criminal activity to governmental agents are testimonial under *Crawford*. Currently, federal and state appellate courts are divided into three camps on this issue: one camp finds such statements nontestimonial; a second camp finds such statements testimonial; and a third camp believes that the circumstances surrounding the statement determine whether it is testimonial. *See* Leonard Post, The National Law Journal, *Eyes on Clarifying "Crawford,"* at 25 (Oct. 24, 2005).

While *Davis* and *Hammon* are factually far removed from the present case, the Supreme Court's resolution of the issues presented in those appeals may, as a practical matter, resolve whether the statements at issue here qualify as testimonial. Based on currently available authority, however, the State will explain below why Julie Jensen's letter to police and her voicemail message to Officer Kosman are nontestimonial.

B. Implicit in *Crawford* is the principle that testimonial statements are those created through some type of government involvement.

Jensen admits that the police played no role in creating Julie Jensen's letter or her voicemail message but claims her statements are nonetheless testimonial since they "pose the same dangers of unreliability [as ex parte police examinations] because they have not been tested by cross-examination." Jensen's brief at 15. This view, however, ignores critical language in *Crawford* strongly suggesting that government involvement in the production of a statement is the *sine qua non* of a testimonial statement.

After recounting at length the historical roots of the Confrontation Clause, the Court in *Crawford* declared,

> [T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. *The Sixth Amendment must be interpreted with this focus in mind.*

541 U.S. at 50 (emphasis added). Consistent with this historical focus, the Court found that an "off-hand, overheard remark" would not implicate the core concerns

of the Sixth Amendment because "it bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.* at 51.

Explaining why police interrogations should be viewed as a modern equivalent to examinations by magistrates, the Court remarked that "[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." 541 U.S. at 53. The Court sounded the same theme in a later footnote: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Id.* at 56 n.7.

Consistent with its observation that government involvement in producing evidence against an accused carries special risks of which the Framers were aware, the Court's examples of testimonial statements all require government involvement in their production, i.e., prior testimony at a preliminary hearing, before a grand jury, or at a former trial; police interrogations; and a plea allocution. 541 U.S. at 64, 68. Referencing all but the latter, the Court stated, "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68.

That *Crawford* implicitly endorses the principle that government involvement in creating a statement is an indispensable feature of a testimonial statement was recognized in a recent opinion rejecting the notion that the "police interrogation" referenced in *Crawford* should include an officer asking bystanders "what happened?" as he arrives at the scene of a reported crime:

> As described in *Crawford*, the Confrontation Clause was a direct response to repeated abuses of the power of inquest—the power to force people to appear and give a statement, under oath or otherwise, to a government official or to a legislative body investigating a potential

> crime. According to *Crawford*, the abuse was not the inquest itself. . . . Rather, the abuse was that these inquisitorial proceedings were employed to obtain accusatory statements that were later introduced, as hearsay, at criminal trials.

Anderson v. State, 111 P.3d 350, 357 (Alaska Ct. App. 2005) (Mannheimer, J., concurring).

In examining the historical practices that gave rise to adoption of the Confrontation Clause and by repeatedly stressing the risks and abuses associated with government involvement in the production of evidence, the *Crawford* Court signaled that the hallmark of a testimonial statement is the government's role in its creation. This suggestion, however, is hardly novel, as the discussion below illustrates.

C. Even before *Crawford*, legal commentators advanced the view that the Confrontation Clause was targeted at government-created hearsay.

Well before *Crawford*, several commentators had concluded that the Confrontation Clause was intended to restrict the admission of government-created hearsay. For example, in Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 Neb. L. Rev. 485, 487 (1987), the author explained that "[t]he procedural dimension [of confrontation doctrine] was based on an unstated assumption that the right of confrontation restricted the ability of the government to create and use hearsay as a substitute for live testimony." Thus, "[t]he use of hearsay most closely resembles trial by affidavit when the hearsay is created by the government in the investigation or prosecution of the crime." *Id.*

Likewise, another legal writer advocated that "hearsay should be understood to implicate the Confrontation Clause only when it consists of statements

that the government itself might generate through coercion or fabrication . . . or that are otherwise made in a formal, legal context (such as testimony at a grand jury proceeding . . .)." Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 U. Mich. L. Rev. 1063, 1121 (1999).

Similarly, Professor Berger wrote: "Hearsay statements procured by agents of the prosecution or police should therefore stand on a different footing than hearsay created without governmental intrusion." Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 561 (1992).

The foregoing examples reveal that the principle the State submits is implicit in *Crawford* – that government involvement is the *sine qua non* of a testimonial statement – was embraced by legal commentators years ago.

D. Jensen's contention that Julie's statements to police are testimonial despite the lack of law enforcement involvement in their production is based on a misreading of *Crawford*.

The foregoing discussion explains why the historical roots of the Confrontation Clause as discussed in *Crawford*, as well as pre-*Crawford* legal commentary, support the view that Julie Jensen's letter and voicemails are nontestimonial because the government was not involved, even remotely, in their production. In arguing to the contrary, Jensen misreads *Crawford*, as an examination of several passages from his brief reveals.

Jensen argues that the Court's comment "Whatever else the term covers," followed by its listing of decidedly testimonial statements, means that "'testimonial' encompasses statements falling outside the three categories identified in *Crawford*" (Jensen's brief at 8).

Jensen is confusing two unrelated points the Court made. The phrase "'[w]hatever else the term covers'" precedes the Court's holding that the term "testimonial" applies "at a minimum" to prior preliminary hearing, trial and grand jury testimony as well as police interrogations. 541 U.S. at 68. Thus, the Court was acknowledging that statements falling outside these limited categories might also be testimonial. However, the Court never tied the phrase "whatever else the term covers" to the three formulations of "testimonial" it had quoted early on in its opinion but did not specifically adopt. *See id.* at 51-52.

As for Jensen's assertion that for Confrontation Clause purposes, "there is no reasonable distinction between an accusatory letter to police and accusations made to police during a question and answer session" (Jensen's brief at 9-10), the difference – at least here – is the lack of government involvement in the former. The State agrees that the Clause governs unsworn statements; otherwise, many statements made during police interrogation would be exempt from the Clause's coverage. However, the State disputes Jensen's contention that because the *Crawford* Court drew no distinction between Lord Cobham's *ex parte* testimony before the Privy Council and his subsequent letters to them, this means that an unsolicited letter created without police involvement is testimonial. Had there been no *ex parte* examination, Lord Cobham could not have penned a letter repeating the same allegations, so in some sense the Privy Council did play a role in producing Lord Cobham's letter. In contrast, Julie Jensen's letter was not preceded or prompted by an *ex parte* examination.

Because Julie's letter and voicemail were created without government involvement, they bear little resemblance to the "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed," i.e., grand jury testimony, testimony at a preliminary hearing or former trial, and police interrogation. *See Crawford*, 542 U.S. at 68. For this reason and the reasons discussed in the State's opening

brief, this court should find that Julie's letter and voicemail are nontestimonial.

II. THIS COURT SHOULD APPLY FORFEITURE BY WRONGDOING EXPANSIVELY SO AS TO EFFECTUATE THE EQUITABLE PRINCIPLES UNDERLYING THE RULE.

Jensen contends that forfeiture by wrongdoing has no bearing here because it "only applies where the defendant's alleged wrongdoing was for the purpose of preventing the witness from testifying." Jensen's brief at 24. According to Jensen, expanding the doctrine as the State has proposed would exceed its common law scope and be unconstitutional. *Id.* at 25-30. He takes issue with the post-*Crawford* cases that apply the forfeiture principle when the defendant's intent in rendering a witness unavailable was not to prevent her from testifying, saying they fail to consider the narrow scope of forfeiture at common law. *Id.* at 37.

Jensen's argument suffers from several analytical flaws. First, he erroneously equates the forfeiture principle to a true hearsay exception. Second, he treats the rule the same as a waiver. Third, he fails to explain why widespread expansion of the doctrine to uncross-examined statements has never been held unconstitutional but the State's proposed application would purportedly violate the Constitution. The State will explore each deficiency below.

A. The forfeiture rule rests on equitable principles and focuses on the defendant's conduct, while a true hearsay exception is based on a statement's content and/or the circumstances surrounding its making.

Crawford declared that the Sixth Amendment right to confrontation "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. at 54. Jensen cites this language to support the view that the modern version of forfeiture by wrongdoing must be limited to the version that existed in 1791, contending that "any exceptions to the confrontation requirement recognized in 1791 cannot be broadened when applied today." Jensen's brief at 26.

When *Crawford* discussed exceptions to the Confrontation Clause, it was referring to various hearsay exceptions believed to be outside the Clause's coverage. For example, the Court noted that several hearsay exceptions "had become well established by 1791" but cautioned that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." 541 U.S. at 55. The Court further observed that the one hearsay exception that was testimonial "involves dying declarations," remarking, "*If this exception must be accepted on historical grounds, it is sui generis.*" *Id.* at 56 n.6 (emphasis added).

Had the Court viewed forfeiture by wrongdoing as an exception, then it would not have described testimonial dying declarations as "*sui generis*." Contrary to Jensen's suggestion, *Crawford* does not equate forfeiture by wrongdoing, which is based on a defendant's conduct, with hearsay exceptions based on the content of a statement and/or the circumstances surrounding its making. *Crawford* therefore does not dictate that modern

application of the forfeiture rule is limited to the factual setting in which it was applied in 1791.

B. Jensen erroneously treats forfeiture the same as waiver.

In arguing that the forfeiture rule is inapplicable unless the defendant acts with the specific intent to prevent the witness from testifying, Jensen implicitly treats forfeiture the same as waiver. However, while the waiver of a constitutional right requires the "intentional relinquishment or abandonment of a known right or privilege," *see Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the rule of forfeiture "has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong" and is "based on the principles of common honesty . . . ." *Reynolds v. United States*, 98 U.S. 145, 159 (1878).

As the court in *State v. Hallum*, 606 N.W.2d 351, 355 (Iowa 2000), observed, "the loss of a defendant's right to object [to an out-of-court statement on confrontation grounds] is based on a forfeiture theory because the loss rests on the defendant's misconduct, not on the defendant's intentional relinquishment of a known right." *See also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part) (recognizing distinction between "waiver" and "forfeiture"); *Steele v. Taylor*, 684 F.2d 1193, 1201 n.8 (6th Cir. 1982) ("It is a legal fiction to say that a person who interferes with a witness thereby knowingly, intelligently and deliberately relinquishes his right to exclude hearsay. He simply does a wrongful act that has legal consequences that he may or may not foresee").

Significantly, *Crawford* invoked the equity-based rule of forfeiture by citing to *Reynolds* rather than to an evidentiary rule like Fed. R. Evid. 804(b)(6), which is viewed as a waiver provision. *See* 541 U.S. at 62. But Jensen overlooks this forfeiture/waiver distinction by

insisting that a defendant's wrongdoing must have been intended to render the witness unavailable to testify before forfeiture will apply.

C. Jensen offers no authority for the proposition that the State's proposed application of the forfeiture principle would be unconstitutional.

Jensen's initial premise in attacking the State's proposed application of forfeiture by wrongdoing is that the doctrine cannot be applied outside the precise factual setting in which it was invoked as of 1791. However, after acknowledging that the modern cases have expanded the doctrine to allow the admission of statements not subject to cross-examination, Jensen does not explain why the State's proposed application of the doctrine to include wrongdoing not specifically intended to render the witness unavailable to testify would be unconstitutional when no court has ever found prior expansion of the doctrine to violate the Constitution. Nor has he pointed to any decision rejecting on constitutional grounds the position the State is advancing.

Unlike Jensen, the post-*Crawford* cases cited in the State's opening brief recognize that it would disserve the premise of the forfeiture rule to say that if the defendant's intent in killing a declarant was based on greed or malice, rather than an intent to prevent him from testifying, then the defendant should be allowed to profit from his misdeed. *People v. Melchor*, no. 1-03-3036, 2005 WL 3041536 (Ill. App. Ct. Nov. 14, 2005), is a recent adherent to this view. Although the *Melchor* court rejected Illinois's argument that the defendant's motive is irrelevant in deciding whether forfeiture applies, the court carved out an exception for cases where the defendant "is on trial for murder of the actual witness whose out-of-court testimony the prosecution wishes to present and the defendants have argued that the forfeiture doctrine only applies when a defendant is charged or is under

investigation for a crime, and wrongfully procures a witness' absence from trial with the intent of preventing testimony about that crime." *Id.* at 10. In that situation, the court found that a defendant should not be immune from forfeiture based on his motive in killing the victim. Otherwise, "defendants would be able to profit from their own wrongdoing." *Id.*

Melchor and the other post-*Crawford* cases cited in the State's opening brief belie Jensen's claim that the State's proposed application of the forfeiture rule would be unconstitutional.

D. The preponderance standard should govern the forfeiture determination.

See pages 34-38 of the State's opening brief.

CONCLUSION

For either of the above reasons, this court should reverse the circuit court's order excluding Julie Jensen's letter and voicemail from Jensen's trial.

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 3,000 words.

Marguerite M. Moeller
MARGUERITE M. MOELLER

STATE OF WISCONSIN

IN SUPREME COURT

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BRIEF OF CROSS-RESPONDENT

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TABLE OF CONTENTS

Page

CASES CITED

Page

Page

OTHER AUTHORITY

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BRIEF OF CROSS-RESPONDENT

ARGUMENT

I. JULIE JENSEN'S STATEMENTS TO HER NEIGHBORS AND TO HER SON'S TEACHER ARE NOT TESTIMONIAL UNDER *CRAWFORD V. WASHINGTON.*

A. Standard of review.

Whether the admission of evidence violates the defendant's right to confrontation is a question of law subject to independent appellate review. *State v. Hale*, 2005 WI 7, ¶ 41, 277 Wis. 2d 593, 691 N.W.2d 637. For

purposes of that review, the appellate court must adopt the circuit court's findings of fact, unless they are clearly erroneous. *State v. Jackson*, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998).

B. Julie's statements are nontestimonial because they were neither made to nor influenced by an agent of the government; nor would an objective witness have reasonably believed these informal statements would be available for use at a later trial.

As discussed in the State's reply brief at 3-5, implicit in *Crawford v. Washington*, 541 U.S. 36 (2004), is the principle that testimonial statements are those created through some type of government involvement. Thus, even where the recipient of a statement is a police officer or other government actor, the statement is not automatically testimonial. *See, e.g., State v. Hemphill*, 2005 WI App 248, __ Wis. 2d __, __ N.W.2d __, where the court recently held that a declarant's spontaneous statement to responding police officers was not testimonial:

> The statement made by Fields in the instant case does not fall into any of the identified categories of "testimonial" statements. This was not a statement extracted by the police with the intent that it would be used later at trial. It was not an interrogation situation. Fields offered the statement without any solicitation from police. It was a spontaneous statement made to a responding police officer. Like the foreign cases cited by the State in its brief, the Fields statement was offered unsolicited by the victim or witness, and was not generated by the desire of the prosecution or police to seek evidence against a particular suspect. *See People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004); *State v. Forrest*, 596 S.E.2d 22 (N.C. Ct. App. 2004); *People v. Corella*, 18 Cal. Rptr. 3d 770 (Cal. Ct. App. 2004).

Id. at ¶ 11.

It necessarily follows that where a statement is not even made to a government agent or his proxy, and the government has no role in its production, the statement will not qualify as testimonial.

Not surprisingly then, Jensen's argument that his deceased wife's statements to her neighbors and to her son's teacher are testimonial under *Crawford* runs counter to the great weight of authority, which establishes that statements not made to a government actor are nontestimonial, regardless of their content. *See, e.g.*, *Demons v. State*, 595 S.E.2d 76, 79-80 (Ga. 2004) (victim's statements to co-worker identifying defendant as source of bruises on his arms and expressing belief that defendant was going to kill him not testimonial); *Compan v. People*, 121 P.3d 876, 881 (Colo. 2004) (victim's statements relating that defendant had physically abused her not testimonial because the victim was speaking informally with a friend); *People v. Garrison*, 109 P.3d 1009, 1011 (Colo. Ct. App. 2004) (murder victim's statements to her training manager not testimonial because "not made to the police, and there is no indication that the manager was acting as a police agent"); *State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (three-year-old victim's statement to examining doctor regarding defendant's penis touching victim's vagina not testimonial where doctor was "not working on behalf of, or in conjunction with" law enforcement to develop a case against defendant); *United States v. Savoca*, 335 F. Supp. 2d 385, 392 (S.D.N.Y. 2004) (inculpatory statements by nontestifying defendant to girlfriend, describing robbery and admitting he and codefendant had large gambling debt, not testimonial because statements "were made to an acquaintance who had no connection to any law enforcement official or proceeding"); *People v. Butler*, 127 Cal. App. 4th 49, 25 Cal. Rptr. 3d 154, 161-62 (Cal. Ct. App. 2005) (statements to fellow teachers identifying defendant as shooter not testimonial).

The view that statements to a nongovernmental actor are nontestimonial is also consistent with the holding in

State v. Manuel, 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811. There this court held that the declarant's statements to his girlfriend implicating Manuel in a shooting were not testimonial under the third formulation set forth in *Crawford*, i.e., "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 281 Wis. 2d 554, ¶ 37. In finding the statements nontestimonial, this court cited the following factors: 1) the statements were made to the declarant's girlfriend during what was apparently a spontaneous, private conversation; 2) the girlfriend was not a government agent, and there was no indication that the declarant thought the girlfriend would report to the police what he had told her; 3) the conversation was confidential and not made with an eye toward litigation; and 4) there was an absence of evidence to indicate the declarant was trying to use his girlfriend to mislead the police. *Id.* at ¶ 53.

Whether this court's decision in *Manuel* to adopt all three formulations of "testimonial" identified in *Crawford*, *see* 281 Wis. 2d 554, ¶ 39, will prove correct following the Supreme Court's decisions in *Davis v. Washington*, No. 05-5224, and *Hammon v. Indiana*, No. 05-5705, remains to be seen. For the time being, however, *Manuel* controls. And because Jensen and the State agree that Julie's statements to the Wojts and Theresa DeFazio are not testimonial under the first or second *Crawford* formulations, the admissibility of these statements depends on whether they "'were made under circumstances which would lead an objective witness reasonably to believe'" the statements "'would be available for use at a later trial.'" 541 U.S. at 52.[1]

Before explaining why the statements at issue are not testimonial under this formulation, however, there are two

[1]This formulation is the broadest of the three definitions of "testimonial" set forth in *Crawford*. Not surprisingly, it was taken from the amicus brief filed by the National Association of Criminal Defense Lawyers. *See* 541 U.S. at 52.

statements made in Jensen's brief which the State finds it necessary to address.

First, at page 5 of his brief, Jensen quotes a passage from *State v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005), indicating that a statement is testimonial if a reasonable person in the declarant's position "'would objectively foresee that his statement might be used *in the investigation or prosecution of a crime*'" (emphasis added). In the sentence immediately following, Jensen equates the quoted language with the "third *Crawford* formulation." Jensen's brief at 6. The language from *Summers* goes beyond the third *Crawford* formulation, however, and would encompass a whole universe of statements that an objective witness would not reasonably believe would be available for use at a later trial. To cite an obvious example, an anonymous tip about suspected drug activity phoned in to a police hotline would not satisfy the third *Crawford* formulation because an objective witness would not reasonably believe the statement would be available for use at a later trial. However, an objective witness *would* reasonably believe that the police would use the tip to investigate criminal activity. Because it includes statements that could be used for investigative purposes, the *Summers*' version of the third *Crawford* formulation is therefore inaccurate, and this court should not be misled by Jensen's attempt to paint the two as equivalent.

Second, at page 6 of his brief, Jensen asserts that "some statements not falling within any of the three *Crawford* formulations must be considered testimonial." In attempting to prove this point – with which the State disagrees – Jensen makes the same error he did in his responsive brief. Once again, he contends that the Court's comment, "Whatever else the term covers," "strongly indicates" that there are testimonial statements falling outside the three formulations identified in *Crawford*. However, the phrase "[w]hatever else the term covers" precedes the Court's holding that the term "testimonial" applies "at a minimum" to prior preliminary hearing, trial

and grand jury testimony, and police interrogations. 541 U.S. at 68. Thus, in using this language the Court was acknowledging that statements falling outside these limited examples might also be testimonial. However, the Court never tied the phrase "whatever else the term covers" to the three formulations of "testimonial" it had quoted early on in its opinion but did not specifically adopt. *See id.* at 51-52.

The State will now discuss why Julie Jensen's statements to the Wojts and Theresa DeFazio are not testimonial under a correct statement of the third *Crawford* formulation.

1. *Crawford*'s third formulation of "testimonial" should not be interpreted in a vacuum, but in light of the abuses which gave rise to the Confrontation Clause and the modern practices which the Court identified as having the closest kinship to those abuses.

In urging this court to find Julie Jensen's statements to her neighbors and her son's teacher testimonial, Jensen would have this court interpret the third *Crawford* formulation in a vacuum, ignoring the historical background of the Confrontation Clause which the Court painstakingly discussed, as well as the Court's admonition that the Sixth Amendment "must be interpreted with this [historical] focus in mind." 541 U.S. at 50. This court should disdain Jensen's approach, for it will yield a result at odds with what the Framers – and the *Crawford* Court – intended.

Crawford's definition of "testimonial" hearsay attempts to capture the Framers' intent with respect to the crucial phrase "witnesses against him." To ascertain that intent as it applies to out-of-court statements, the

Crawford Court determined that "[t]he Constitution's text alone does not resolve" the phrase's meaning. *Crawford*, 541 U.S. at 42-43. The Court therefore "turn[ed] to the historical background to understand its meaning." *Id.* at 43.

The Court reviewed "the founding generation's immediate source of the concept" of the right to confront one's accusers: the English common law. *Crawford*, 541 U.S. at 43. The Court contrasted the English common law's "manner in which witnesses gave testimony in criminal trials," which was one of "live testimony in court subject to adversarial testing," with that of the continental civil-law, which allowed "examination in private by judicial officers." *Id.*

The Court recounted that against the backdrop of this common law tradition, the English subjects watched as elements of the "civil-law practice" crept into their criminal law. For example, the Marian bail and committal statutes required justices of the peace "to examine suspects and witnesses in felony cases and to certify the results to the Court." *Crawford*, 541 U.S. at 44. In some cases, these pretrial examinations were used as evidence in the subsequent trial, resulting in the tacit adoption of the continental civil-law procedure.

According to *Crawford*, the most notorious instances of civil-law examination occurred in the great political trials of the sixteenth and seventeenth centuries. *Crawford*, 541 U.S. at 44. The Court specifically focused on the 1603 trial of Sir Walter Raleigh, describing it as the "paradigmatic confrontation violation." *Id.* at 52. The principal witness against Raleigh was an alleged accomplice, Lord Cobham. But Lord Cobham never testified live at Raleigh's trial. Rather, Cobham was examined *ex parte* by the Privy Council and this examination was read to the jury. Sir Walter Raleigh was thus condemned on the basis of an *ex parte* examination, produced by the government and offered as evidence at trial in lieu of Cobham's live testimony. Thereafter,

"[t]hrough a series of statutory and judicial reforms, English law developed a right of confrontation *that limited these abuses*." *Id.* at 44 (emphasis added).

Thus, the driving force behind the right of confrontation was the use of continental law procedures anathema to the common law tradition, whereby the government produced *ex parte* testimony and offered it in lieu of live in-court testimony of the witness. The *Crawford* Court pointed out that a similar series of "civil-law abuses" in colonial America likewise caused the right of confrontation to be included in colonial declarations of rights. For example, when England granted jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law procedures, John Adams expressed his "abhorrence" of *ex parte* examinations. *Crawford*, 541 U.S. at 47-48. Because these "controversial examination practices were also used in the Colonies," *id.* at 47, the Framers enshrined the right of confrontation in the Sixth Amendment.

Other courts have recognized the significance of the historical record detailed in *Crawford* when judging whether a given statement is testimonial. For example, in *People v. R.F.*, 825 N.E.2d 287 (Ill. App. Ct. 2005), the court cited several passages illustrating *Crawford*'s concern with historical practices in concluding that a child's statements to her mother and grandmother, reporting that the defendant had pinched her vaginal area, were not testimonial because they were made to nongovernmental actors:

> Importantly, *Crawford* repeatedly emphasized the significance of governmental involvement in determining whether a hearsay statement is testimonial. Specifically, the Court noted that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." *Crawford*, 541 U.S. at 50-52, 124 S.Ct. at 1364, 158

> L.Ed.2d at 192-93. Further, in holding that a statement taken in the course of a police interrogation is testimonial, the Court noted that "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England" (*Crawford*, 541 U.S. at 50-52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193) and that the "involvement of government officers in the production of testimonial evidence presents the same risk [of violating the confrontation clause], whether the officers are police or justices of the peace." *Crawford*, 541 U.S. at 52-54, 124 S.Ct. at 1365, 158 L.Ed.2d at 194. The Court further noted, in response to Justice Rehnquist's questioning of the propriety of its holding, that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." (*Crawford*, 541 U.S. at 55 n. 7, 124 S.Ct. at 1367 n. 7, 158 L.Ed.2d at 196 n. 7). Finally, the Court noted that not every inculpating statement runs afoul of the confrontation clause; rather, it is only those inculpating statements "given in a testimonial setting," e.g., as a result of some type of governmental involvement, that "trigger" the clause's demands. *Crawford,* 541 U.S. at 64-66, 124 S.Ct. at 1372, 158 L.Ed.2d at 201.
>
> Thus, *Crawford* applies only to statements made to governmental officials; *Crawford* does not apply to statements made to nongovernmental personnel, such as family members or physicians.

825 N.E.2d at 294-95.

Similarly, in determining if Julie Jensen's statements to the Wojts and Theresa DeFazio are testimonial, this court should examine how closely related these statements are to the statements the *Crawford* Court actually held to be testimonial: grand jury testimony; testimony at a preliminary hearing or a former trial; and police interrogation.

2. Julie's statements to her neighbors and her son's teacher bear little resemblance to the abuses which prompted adoption of the Confrontation Clause.

Unlike prior testimony at various court proceedings or statements elicited during police interrogation, Julie Jensen's statements to her neighbors were produced without any government involvement. Unlike the types of statements the *Crawford* Court said were definitely testimonial, Julie's statements were not accompanied by any formalities, nor were they preserved in any recorded form. In contrast to police interrogation or testimony before a grand jury, at a preliminary hearing or at trial, Julie's statements were made before any crime had occurred or before any investigation had begun.

Julie's statements to her neighbors and a school teacher therefore bear little resemblance to the abuses which prompted the adoption of the Confrontation Clause or their modern day equivalents.

3. An objective witness would not reasonably believe Julie's private, unrecorded statements to nongovernmental actors would be available for use at a later trial.

In deciding whether an objective witness would reasonably believe that Julie's statements to her neighbors and her son's teacher would be available for use at a later trial, this court should limit its consideration to "the facts readily available to [Julie] at the time of the speech at issue, not every fact potentially available to an omniscient observer." *State v. Savanh*, 2005 WI App 245, ¶ 24, __Wis. 2d __, __ N.W.2d __ , citing *State v. Douglas D.*, 2001 WI 47, ¶ 34 n.12, 243 Wis. 2d 204, 626 N.W.2d 725.

An objective witness – unless he had a crystal ball – would not have known that Julie would ultimately die from ethylene glycol poisoning or that Jensen would later be charged with murdering her. This court should therefore resist the temptation to consider facts not yet in existence at the time of Julie's statements when it considers whether the statements fit the third *Crawford* formulation for testimonial.

In deciding whether Julie's statements to the Wojts and DeFazio were testimonial, this court should also keep in mind that all three *Crawford* formulations of testimonial envision a degree of formality that impresses on the declarant the significance of her statements:

> The three ***Crawford*** formulations contemplate a measure of formality which gives the declarant some indication of the statement's significance. As the Court observed, the abuses the Confrontation Clause targets are not "off-hand, overheard remark[s]." ***Id.*** at 51. Rather, the text of the Clause contemplates "witnesses . . . bear[ing] testimony," and "testimony" typically means a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Id.*** "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." ***Id.***

State v. Savanh, 2005 WI App 245, ¶ 22.

Julie's statements to the Wojts – summarized at pages 2-3 of Jensen's brief – were made, not during a single encounter, but over a period of time starting about two weeks before her death. These statements conveyed Julie's suspicions that her husband was trying to poison her, and they also related Julie's observations about her husband seeking information on poisoning via the Internet. When Julie made some of her statements, she was "shaking and crying" (1:2).

The circumstances in which these statements were made would not cause an objective witness to reasonably believe they would be available for use at a later trial.

There was nothing formal about the statements; they were not recorded in any fashion; no trial was contemplated when the statements were made; and the recipients were trusted friends of the declarant. In this regard, the same four factors this court cited in *Manuel*, 281 Wis. 2d 554, ¶ 53, that led to a finding that the declarant's statement to his girlfriend was nontestimonial apply here: 1) the statements were made to Julie's friends during what were apparently a series of spontaneous, private conversations; 2) the friends were not government agents, and there was no indication Julie thought the friends would report to the police what she had told them; 3) the conversations were confidential and not made with an eye toward litigation; and 4) there was no evidence to indicate Julie was trying to use her friends to mislead the police.

The same analysis applies with respect to Julie's statements to Theresa DeFazio. Like the statements to the Wojts, Julie's statements to DeFazio were made in private; they were unrecorded; there was no formality involved; and no trial was contemplated when they were made. Moreover, DeFazio had to coax Julie to tell her what was wrong and had to ask Julie why she thought her husband was trying to kill her (1:2). This made it even less likely that an objective witness would reasonably believe Julie's statements to her son's teacher would be available for use at a later trial. With respect to Julie's statements to DeFazio, the same factors that led this court to find the statements at issue in *Manuel* nontestimonial are also present and should lead to the same finding here.

C. This court should decline Jensen's invitation to find that the accusatory nature of a statement to a nongovernmental actor renders it testimonial.

The only case Jensen could find to support his claim that Julie's statements to DeFazio and the Wojts are testimonial is *In re E.H.*, 823 N.E.2d 1029 (Ill. App. Ct.),

appeal allowed, 833 N.E.2d 1 (Ill. 2005). There the Illinois court held that a three-year-old girl's statements to her grandmother accusing a thirteen-year-old babysitter of sexual assault were testimonial. The court relied on an earlier case, *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004), for the proposition that when the content of a victim's statement concerned fault or identity, "such testimonial statements were only admissible if the declarant testified at trial and was subject to cross-examination." *In re E.H.*, 823 N.E.2d at 1037.

The *E.H.* court thought that if a statement accused the defendant of wrongdoing and was offered to prove the truth of the matter asserted, then it must be testimonial under the Confrontation Clause. *See* 823 N.E.2d at 1035. To support this conclusion, the court turned to a 1979 evidence treatise, *Wigmore on Evidence*. Specifically, the court cited § 479 of the treatise, entitled, "Any assertion, whether made in court or not, may be testimonial evidence." The court quoted the following excerpt from this section: "'*Any* assertion, taken as the basis of an inference to the existence of the matter asserted, *is testimony*, whether made in court or not.'" 823 N.E.2d at 1036. From this, the court reasoned that three-year-old B.R.'s statements were not only "the basis of the inference" but were also used substantively to prove the truth of the matter asserted therein, i.e., that E.H. had sexually assaulted B.R. *Id.*

The court in *E.H.* labored under the mistaken impression that the term "testimonial" employed in *Crawford* was interchangeable with Wigmore's definition of "testimonial evidence." However, Wigmore had defined the term "testimonial" as follows:

> The necessity for a distinction between testimonial (or direct) and circumstantial (or indirect) evidence has already been considered (§25 *supra*). It was there noticed that the testimonial class of evidence is differentiated from all others as governed by a set of rules of admission peculiar to itself — a class including *human assertions taken as the basis of an inference to*

> *the truth of the fact asserted.* The process of all evidence is an inference from one fact to the existence of another — from evidence to proposition (§2 *supra*). In the present class of evidence the uniform feature is that the inference is to be drawn from the fact of an assertion having been made to the truth of the matter asserted.

II John Henry Wigmore, Evidence, § 475, at 633 (1979).

Only by erroneously equating Wigmore's "testimonial" with the term "testimonial" used in *Crawford* did the court in *E.H.* reach the unsupportable conclusion that if "direct evidence" is uttered out of court and used to prove the truth of the matter asserted, then it is necessarily testimonial under the Confrontation Clause. Needless to say, this court should decline Jensen's invitation to follow the Illinois court's lead.

For all these reasons, this court should uphold the trial court's determination that Julie Jensen's statements to the Wojts and Theresa DeFazio are not testimonial under *Crawford*.

II. EVEN IF JULIE'S STATEMENTS TO THE WOJTS AND DeFAZIO ARE TESTIMONIAL, THEY SHOULD BE ADMISSIBLE UNDER THE DOCTRINE OF FORFEITURE BY WRONGDOING IF THE STATE CAN CONVINCE THE TRIAL COURT BY A PREPONDERANCE OF THE EVIDENCE THAT JENSEN KILLED HIS WIFE.

The State has already discussed at length in its brief-in-chief at 13-38 and in its reply brief at 8-12 why Julie Jensen's letter and voicemail to police, even if testimonial, should be admissible under the doctrine of forfeiture by wrongdoing if the State can convince the trial court by a preponderance of the evidence that Jensen killed his wife. Similarly, even if this court finds that Julie's statements to

the Wojts and to Theresa DeFazio are testimonial, it should hold that these statements can still be admitted if the State proves to the trial court, by a preponderance of the evidence, that Jensen procured Julie's unavailability by murdering her.

The State will not repeat those arguments here. However, two points regarding application of the doctrine need clarification.

First, in citing to *State v. Whitaker*, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992), for the proposition that the trial court should be allowed to consider Julie Jensen's testimonial statements in determining whether forfeiture applies, the State was aware that *Whitaker* says the hearsay declarations of alleged coconspirators may be considered by the trial court in determining the existence of a conspiracy[2] and that *Whitaker* did not involve a forfeiture determination. Nevertheless, the State believes *Whitaker* by analogy supports the view that Julie's statements may be considered along with other evidence in deciding whether Jensen forfeited his confrontation rights by killing her.

Second, insofar as Jensen urges that forfeiture by wrongdoing should be limited to evidence otherwise admissible under the hearsay rules, the State is in partial agreement. Specifically, if there are portions of Julie's statements that would have been subject to a valid hearsay objection had Julie given live testimony, then the forfeiture doctrine should not render those portions admissible. However, with respect to any testimony that Julie would have been allowed to offer at trial had she not died, then Jensen has also forfeited any hearsay exception.

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[2]The court of appeals in *State v. Savanh*, 2005 WI App 245, ¶ 15, recently reaffirmed this principle.

CONCLUSION

This court should uphold the trial court's ruling finding Julie Jensen's statements to the Wojts and Theresa DeFazio nontestimonial. Alternatively, this court should hold that even if such statements are testimonial, they are admissible at trial if the State can convince the trial court by a preponderance of the evidence that Jensen rendered Julie unavailable by killing her.

Dated this 8th day of December, 2005.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 4,475 words.

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